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In the Supreme Court

OF THE

United States

OCTOBER TERM 1978

No. 78-759

WAYNE L. KIDWELL, Attorney General of Idaho,
and TOM D. McELDOWNEY,
Director of the Department of Finance
of the State of Idaho,
Appellants,

vs.

GREAT WESTERN UNITED CORPORATION,
Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

JURISDICTIONAL STATEMENT

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On Appeal from the United States Court of Appeals for the Fifth Circuit

JURISDICTIONAL STATEMENT

Wayne L. Kidwell, Attorney General of Idaho, and Tom D. McEldowney, Director of the Department of Finance of the State of Idaho, appeal from the final judgment of United States Court of Appeals for the Fifth Circuit entered on the 10th day of August 1978, affirming a decision of the United States District Court for the Northern District of Texas, Dallas Division, and holding that: (1) the Texas long arm statute authorized assertion of personal jurisdiction by the district court over the non-resident defendant Idaho officials; (2) the Securities Exchange Act of 1934 provided an independent basis for personal

jurisdiction over said officials; (3) venue was proper in the Northern District of Texas; (4) the Idaho Corporate Takeover Law was preempted by the Securities Exchange Act of 1934 as amended by the Williams Act; and (5) the said Idaho law was also invalid under the commerce clause as an unconstitutional burden on interstate commerce.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, which appears in the Appendix hereto, pp. A-1 to A-84, *infra,* is reported at 577 F.2d 1256 (5th Cir. 1978).

The Memorandum Decision of the United States District Court for the Northern District of Texas, Dallas Division, which appears in the Appendix hereto, pp. A-85 to A-125, *infra,* is reported at 439 F.Supp. 420 (N.D. Tex. 1977).

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit affirming the decision of the United States District Court for the Northern District of Texas, Dallas Division, was entered on the 10th day of August 1978.

Notices of appeal to this Court were duly filed in the United States Court of Appeals for the Fifth Circuit on the 23d day of October, 1978, (Appendix hereto, pp. A-126 to A-127) and in the United States District Court for the Northern District of Texas, Dallas Division, on the 24th day of October, 1978 (Appendix hereto, pp. A-128 to A-129).

This appeal is being docketed in this Court within ninety (90) days from rendering of the final decision below. The

jurisdiction of this Court is being invoked under 28 U.S.C. § 1254(2).

QUESTIONS PRESENTED

1. Whether due process or federalism principles will allow a federal court in Texas to assert personal jurisdiction over officials of the State of Idaho, one of whom took no action whatsoever and the other of whom acted solely in Idaho in his governmental capacity by enforcing Idaho law, on the theory that the official acts in Idaho had consequences or practical effects in the State of Texas.

2. Whether a state official acting in his state solely in a governmental capacity by enforcing his own state's laws may be deemed to be "in" or "conducting" business in some other state for purposes of long-arm jurisdiction, state or federal, in the other state.

3. Whether the doctrine of *Ex parte Young,* which permits suit against a state official under circumstances where the Eleventh Amendment would bar a suit against the state itself, may constitutionally be extended to subject Idaho officials acting solely within their governmental capacity in Idaho to suit in a court sited in Texas.

4. Whether enforcement by a state official in Idaho of Idaho law which allegedly conflicts with a portion of the Securities Exchange Act of 1934 constitutes a "violation" of said Act for purposes of federal court jurisdiction thereunder when no specific proscription of thereof has been breached.

5. Whether, in an action brought in Texas by a Texas resident against Idaho officials to invalidate an Idaho

statutory scheme on the ground that it conflicts with or is preempted by the Securities Exchange Act of 1934, venue is proper in Texas either because (a) under the jurisdiction portion of the Exchange Act a "violation" occurred in Texas or (b) under general federal venue statutes the claim against the Idaho officials arose in Texas, under a theory that the plaintiff was affected in Texas by the acts in Idaho of an Idaho official in enforcing the Idaho law.

6. Whether Congress has reserved to the States, under Section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), the power to regulate corporate takeover offers in a manner which differs from that adopted in the Williams Act amendments to the Securities Exchange Act of 1934.

7. Whether, independently of Section 28(a), the States have the inherent power to regulate corporate takeover offers in a manner which differs from that adopted in the Williams Act amendments to the Securities Exchange Act of 1934.

8. Whether a federal court may weigh the benefits of a state corporate takeover law against its alleged effect upon interstate commerce.

9. Whether, independently of Section 28(a), state corporate takeover laws constitute an undue burden on interstate commerce.

10. Whether a tender offeror has standing to maintain an action under the Williams Act amendments to the Securities Exchange Act of 1934 to challenge the constitutionality of state corporate takeover laws.

CONSTITUTIONAL PROVISIONS AND RULES

Article 1, Section 8, Clause 3, United States Constitution:

> The Congress shall have Power . . .
>
> To regulate Commerce . . ., among the several States, . . . ;

Article 6, Clause 2, United States Constitution:

> This Constitution and the Laws of the United States which shall be made in pursuance thereof; . . ., shall be the surpreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.

Eleventh Amendment, United States Constitution:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any foreign state.

Securities Exchange Act of 1934, §§ 13(d, e), 14(d-f), 15 U.S.C. §§ 78m(d, e), 78n(d-f) (1970):

> Because of length of text, reproduced at pp. A-130 to A-138 of Appendix.

Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa:

> The district courts of the United States, . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity or actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred.

Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. . . .

§ 28(a), 15 U.S.C. § 78bb(a):

. . . Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

§§ 30-1501 to 30-1513:

Because of length of text, reproduced at pp. A-139 to A-155 of Appendix.

Texas Revised Civil Statutes Annotated article 2031b, § 3 (Vernon):

Any foreign corporation, association, joint stock company, partnership, or non-resident natural person that engages in business in this State, irrespective of any Statute or law respecting designation or maintenance or resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such foreign corporation, joint stock

company, association, partnership, or non-resident natural person of the Secretary of State of Texas as an agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such corporation, joint stock company, association, partnership, or non-resident natural person is a party or to be made a party.

Texas Revised Civil Statutes Annotated article 2031b, § 4 (Vernon):

For purposes of this Act, and without including other acts that may constitute doing business, any foreign corporation, joint stock company, association, partnership, or non-resident natural person shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or by the committing of any tort in whole or in part in this State.

* * *

RAISING THE FEDERAL QUESTION

In its complaint and at all stages of the proceedings below the Appellee raised the claim that the Idaho Corporate Takeover law, IDAHO CODE §§ 30-1501 to 30-1513, was repugnant to the United States Constitution, both as being preempted by the supremacy clause, Article 6, cl. 2, and as being an undue burden on interstate commerce, Article 1, § 8, cl. 3, due to the enactment and existence of the Williams Act amendments to the Securities Exchange Act of of 1934, 15 U.S.C. §§ 78m(d, e) & 78n (d-f), which claim was resisted by Appellants.

At the earliest stages of the proceedings below Appellants raised their contentions that the United States Court for the Northern District of Texas, Dallas Division, lacked jurisdiction over them, and that venue was improper in said court.

After a special hearing solely on the issues of jurisdiction and venue which was ordered by the United States Court of Appeals for the Fifth Circuit the district court entered findings of fact, conclusions of law and its order holding that personal jurisdiction and venue were proper therein, and this conclusion was reflected in the subsequent Memorandum Decision of said district court. After trial on the merits the district court further concluded that the Idaho law was preempted by the federal law and was also an undue burden on interstate commerce.

Appeal was taken to the United States Court of Appeals for the Fifth Circuit wherein the jurisdiction and venue claims of the Idaho officials were reiterated as well as the contention that the Idaho law was not in conflict with or preempted by United States constitutional provisions. In a decision written by Wisdom, J., and joined in by Clark, J., over the vigorous dissent of Godbold, J., the circuit court affirmed the jurisdiction, venue, and constitutional conclusions of the district court.

STATEMENT OF THE CASE

Appellee Great Western United Corporation (hereinafter GWU), a Delaware corporation with executive offices in Dallas, Texas, the controlling interest in which is owned by N. B. Hunt and W. H. Hunt, is traded on the N.Y.S.E. Early in 1977 GWU proposed a partial tender

offer for two million shares of the Sunshine Mining Company, a N.Y.S.E. traded Washington corporation with its principal silver mining operation in the state of Idaho and other substantial subsidiary assets located in the States of New York and Maryland. The tender offer for shares of stock brought into play the federal law disclosure requirements of the Williams Act amendments to the Securities Exchange Act of 1934 as well as, potentially, the disclosure and review requirements of corporate takeover laws of the three states.

Simultaneously, on Monday, March 21, 1977, Great Western United Corporation representatives personally appeared at and filed a 13D disclosure statement with the United States Securities and Exchange Commission, personally appeared in Idaho and filed an information statement under the Idaho Corporation Takeover Law, and personally appeared in and approached the proper authorities of the States of New York and Maryland regarding assertion of jurisdiction under those States' corporate takeover laws. Pursuant to request by GWU representatives that they be informed in Texas by telephone and telecopy of Idaho's response to the GWU filing, on Friday, March 25, 1977, Idaho's Deputy Administrator of Securities telecopied to Texas a letter requesting more information from GWU (reproduced in Appendix hereto at pp. A-156 to A-164) and Appellant McEldowney telecopied to GWU his order delaying the effective date of the GWU tender offer (reproduced in Appendix hereto at pp. A-165 to A-166. In response, on Monday, March 28, 1977, GWU filed an action seeking injunctive relief and a declaratory judgment in the United States District Court for the Northern District of

Texas, Dallas Division, against the attorneys general and officials in charge of securities regulation of the States of Idaho, New York, and Maryland, and alleged that the corporate takeover laws of the three states were repugnant to the Constitution of the United States and that jurisdiction over the state officials and venue were proper in the Northern District of Texas.

Concurrently, GWU applied to the district court for an *ex parte* temporary restraining order against the state officials to prohibit their enforcement of the challenged state laws. After counsel for the Idaho officials called the court, the matter was continued until 9:00 a.m., Wednesday, March 30, 1977, for a hearing on GWU's motion for a restraining order. Counsel for the Idaho and Maryland officials appeared at the March 30 hearing, and a formal motion to dismiss for lack of jurisdiction and venue was presented in behalf of the Idaho officials. After hearing argument by counsel for GWU and for the Idaho and Maryland state officials, accepting exhibits, and having received a brief in behalf of the Idaho official defendants on the issues of jurisdiction and venue, the court, at approximately 2:30 p.m. of said day, entered a temporary restraining order as requested by GWU, and consolidated a hearing for preliminary injunction and trial on the merits for Friday, April 8, 1977. The court refused Idaho counsel's request for a stay of its order pending an emergency appeal to the United States Court of Appeals for the Fifth Circuit. Idaho counsel, joined by New York and Maryland counsel, immediately filed a request for emergency appeal to said Circuit Court, which was granted and oral argu-

ment thereon scheduled for Tuesday, April 5, 1977. Following a spirited argument and questioning by all members of the judicial panel, the circuit court on April 6, 1977, stayed the order of the district court pending further proceedings therein, ordered that court to consider the issues of jurisdiction and venue and enter findings of fact and conclusions of law thereon before consideration of the merits, and suggested that because the "proceeding involves novel and difficult issues which have broad impact upon federalism" that, should the district court determine that it has jurisdiction and venue, it should consider interlocutory certification of such determination to the circuit court under 28 U.S.C. § 1292(b) (1970) before the trial on the merits. (The circuit court's order is reproduced in its entirety in the Appendix hereto at p. A-167.)

The hearing so ordered was held in Dallas on April 8, 1977, and on April 21, 1977, the court filed its written findings of fact, conclusions of law, and order, which held that no case or controversy existed between GWU and the Maryland officials, but that jurisdiction and venue were proper in the Northern District of Texas against the Idaho and New York officials against whom a case or controvesry was deemed to exist. The court declined to make an interlocutory certification of the jurisdiction and venue issues to the Fifth Circuit. Mandamus and prohibition petitions, as well as petitions for leave to appeal under 28 U.S.C. §§ 1291 and 1292(b), were presented to the United States Court of Appeals for the Fifth Circuit which, on May 16, 1977, denied the requested relief.

On May 23 and 24, 1977, the merits of the case were tried to the court and several expert witnesses were heard

from each side to the controversy. As a result of a letter from the New York Attorney General declining jurisdiction under the New York takeover law the court dismissed the action against New York's Attorney General due to mootness. In its Memorandum Decision rendered September 2, 1977, the district court considered the issue of standing as well as reiterated its jurisdiction and venue determinations and concluded regarding the merits that the Idaho Corporate Takeover Law was prohibited by the supremacy clause of the United States Constitution due to implied preemption by federal law and was so in conflict with the Constitution's commerce clause as to constitute an undue burden upon interstate commerce.

The Idaho officials filed an appeal to the United States Court of Appeals for the Fifth Circuit on September 8, 1977, and oral argument thereon was presented on December 13, 1977. On August 10, 1977, the appellate court decision affirming the district court decision below, with Judges Wisdom and Clark in the majority over the dissent of Judge Godbold, was filed.

THE QUESTIONS ARE SUBSTANTIAL

This Court's landmark 1908 decision in *Ex parte Young*, 209 U.S. 123 (1908), and all its progeny wherein state officials have been made amenable to suit by a stripping of their Eleventh Amendment cloak of sovereign immunity have occurred solely in courts sited within the states wherein such officials have held office. The *Young* fiction has never been extended beyond its limited home state jurisdictional base, nor is there any reported case prior to this instant action in which a court sited outside the official's home state has presumed to entertain jurisdiction

over a non-resident state official as a result of actions that person has taken or might take in his governmental capacity. In fact, in the only two reported cases of note on the subject the courts have found jurisdiction over non-resident state officials fatally lacking. *Turner v. Baxley*, 354 F.Supp. 963 (D. Vt. 1972); *Idaho Potato Commission v. Washington Potato Commission*, 410 F.Supp. 171 (D. Idaho 1976).

Not only are the minimum contacts articulated by this Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and *Hanson v. Denckla*, 357 U.S. 235 (1958), totally lacking by virtue of the fact that only one of the affected Idaho officials acted at all and the whole of his action took place within the State of Idaho as a result of a submission to the jurisdiction of Idaho law by Appellee Great Western United Corporation, thus creating no direct effects in the State of Texas, but also the commercial activity *by the defendant* which has given rise to out of state jurisdiction was fatally lacking with respect to the state officials acting in a governmental capacity with regard to their state's laws. Every instance wherein use of a foreign forum has been authorized by the courts has been directed at defendants who engaged in commercial, profit-oriented enterprise. See *Kulko v. Superior Court*, —— U.S. ——, 98 S.Ct. 1690, 1699 (1978). It is further impossible to conceive of a circumstance under which state officials charged with action such as is evidenced herein would be entitled to enjoy the "benefits and protections" of the laws or courts of the foreign forum as articulated in *International Shoe* or *Hanson v. Denckla*. Another problem surrounds the concept of exercising a "privilege

of conducting activities in a state" set out in *International Shoe*. The phrase implies that the forum state accedes to the conduct of certain activities within its borders and makes the person so acting amenable to suit in the forum's courts as a "price" exacted for allowing the conduct. In the context herein, it is difficult to imagine the State of Texas acceding to purposeful activities therein by state officials of another state directed as Texas residents, nor did such activity occur.

Assertion of Texas long-arm jurisdiction can only be based upon satisfaction of two levels of inquiry. First, the exercise of jurisdiction must be within some statutorily conferred authority. TEX. REV. CIV. STAT. ANN. art. 2031b, §§ 3, 4 (Vernon). Though the Texas Supreme Court has recently refused to engage in semantical nuances over what constitutes "doing business" in Texas for long arm jurisdiction purposes, the "doing business" concept must not fail to be explored carefully when attempted to be applied to state officials of a foreign state who are charged solely with the performance of governmental functions. *U-Anchor Advertising, Inc. v. Burt,* 553 S.W. 2d 760 (Tex. 1977), *cert. denied,* 98 S.Ct. 1235 (1978). Appellant state official Kidwell took no action whatsoever to enforce the relevant Idaho law, yet was sued merely because he is statutorily charged with a duty of enforcement. Appellant state official McEldowney took the following action in enforcing in Idaho an Idaho law: (*i*) reviewed in Idaho a registration statement voluntarily filed in Idaho by Appellee GWU under the Idaho corporate takeover law, (*ii*) authorized his Deputy Administrator for Securities to issue a comment letter about the registration statement by transmitting the same, at GWU's request, by telecopier from Idaho, (*iii*) issued from Idaho by telecopier an administrative order delaying the effective date of GWU's proposed tender offer. None of the actions occurred in Texas; none of the actions occurred in a commercial or business context as contemplated by the Texas long-arm statute.

Though it is improper to look at the second, due process, level of inquiry under the Texas long-arm statute if the threshold "business" activity context is unfulfilled, the due process and fundamental fairness requirements mandated by numerous decisions of this Court cannot be overlooked. See *International Shoe Co. v. Washington, supra; Hanson v. Denckla, supra; Shaffer v. Heitner,* 433 U.S. 186 (1977); *Kulko v. Superior Court,* —— U.S. ——, 98 S.Ct. 1690 (1978). A "practical" or "extra-territorial" effect of action taken by state officials in Idaho which comes to rest in Texas does not meet this Court's Fifth Amendment due process or fundamental fairness standards. *Kulko v. Superior Court,* —— U.S. ——, 98 S.Ct. 1690, 1699 (1978). Under a "practical" or "extra-territorial" effect standard state officials taking action in their own states would be amenable to suit in *any* state wherein a residual effect of their action was felt despite the fact that such officials did not purposefully derive any benefit from any activities relating to such foreign states—an unwarranted result. *Id.* Such a concept, though unique, would have a devastating effect upon federalism concepts which underlie our Constitution, would cause an undue and unwarranted raid upon state treasuries to meet the extraordinary expense of defending actions in foreign jurisdictions, and would have a chilling effect upon state legislatures if all laws contem-

plated for passage must first be measured in terms of the potential effect they might have in some other state. Though the trial court and court of appeals, applying decisions relating to the Texas long-arm statute, concluded that fundamental fairness and due process standards were met in this action, neither court took into consideration the more narrow approach to long-arm jurisdiction announced in late July, 1977, by the Texas Supreme Court in *U-Anchor Advertising, Inc. v. Burt,* 553 S.W.2d 760 (1977), *cert. denied,* 98 S.Ct. 1235 (1978).

Venue, too, under the general federal venue statute, 28 U.S.C. § 1391(b) (1970), is just as lacking as is personal jurisdiction. Though the court of appeals opted for an "expansive interpretation of the venue statute," *Great Western United Corp. v. Kidwell,* 577 F.2d 1256, 1273 (5th Cir. 1978), which has not been authorized by this Court, the district court properly concluded that GWU's "claim arose in Idaho, the source of the power extra-territorially asserted", *Great Western United Corp. v. Kidwell,* 439 F.Supp. 420, 433 (N.D. Tex. 1977), and that the argument that GWU was injured in Texas could be applied equally to all other federal judicial districts, *id.* Though the court of appeals would place venue in Texas, apparently under a theory of judicial economy, by theorizing on the difficulties which might be faced by GWU if New York and Maryland officials had remained in the suit, such an "efficiency" concept cannot be the excuse for beating down constitutional due process standards. *Turner v. Baxley, supra; Idaho Potato Commission v. Washington Potato Commission, supra.*

Applying the jurisdiction and venue section of the Securities Exchange Act of 1934, § 27, 15 U.S.C. § 77aa (1970), to this action requires a deliberate perversion of the concept of a "violation" of the securities laws contained therein as a jurisdictional requisite. It is well recognized that corporations are creatures of state law and that most activities of a corporation and those who guide it are governed by state, not federal, law. *Cort v. Ash,* 422 U.S. 84 (1975), *Santa Fe Industries, Inc. v. Green,* 430 U.S. 462 (1977). In light of the fact that Congress has not seen fit to attempt to preempt the entire corporate law field by enacting a federal law of corporations, the incursions into state corporate regulation occasioned by Congress in the field of securities regulation must be deemed a limited incursion and, as recognized by section 28(a), 15 U.S.C. § 78bb(a) (1970), the Securities Exchange Act of 1934, is not designed to "affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with" the 1934 federal Act. The linchpin of the instant case is whether an alleged "conflict" with federal law will rise to the dignity of a "violation" of the 1934 Act for jurisdiction when no articulated proscription of the Act has been breached, and whether state officials engaged solely in the governmental function of enforcing state corporate takeover laws are somehow "participants in" the securities field so that they are subjected to the duties required of participators, rather than regulators of the securities field acting in concert with federal regulators. It is clear from judicial interpretations and the legislative history of the Securities Exchange Act

of 1934 that its purpose was to prevent and punish fraud in the purchase and sale of securities by aiming at stock manipulators, and was not designed to affect state officials who were themselves attempting to regulate in the securities field. See, e.g., *Hooper v. Mountain States Securities Corp.*, 282 F.2d 195, 205 (5th Cir. 1960). The problem with the syllogism advanced by GWU and entertained by the district and circuit courts in concluding that a "conflict" between state and federal law or an implied preemption of state law constitutes a "violation" of the Securities Exchange Act of 1934 for jurisdictional purposes is that no portion of the Act places any affirmative duty on states or state officials which *can* be "violated." Even if a "conflict" or implied preemption existed for Section 28(a) purposes that section in no terms makes such effect illegal or a "violation" of the Act. All Section 28(a) provides is that state law which does not conflict is permitted, thus indicating that conflicting state law would be a nullity or unenforceable. Section 28 prohibits no conduct, nor does it prescribe acceptable conduct, and no case decided under section 28 prior to this instant action has ever attempted to equate a "violation" of the Securities Exchange Act of 1934 with enactment or enforcement of a state statute.

Personal jurisdiction under Section 27 of the 1934 Act is just as lacking as it is under the Texas long-arm statute under the same constitutional due process and fundamental fairness tests which must be applied. It is incomprehensible how use of an interstate medium, the telephone, at the request of the Appellee (rather than requiring GWU to come back to Idaho to receive the administrative decision) might provide the necessary constitutional standard

whereby the Idaho officials would be subjected to the jurisdiction of a foreign court. If this be so, then jurisdiction should have been denied merely because GWU, by itself requesting the use of the interstate medium, wrongfully induced the one Idaho official who took action to participate in an action which could subject him to foreign jurisdiction. *Kulko v. Superior Court,* —— U.S. ——, 98 S.Ct. 1690 (1978).

Venue under Section 27 is similarly lacking. The novel approach of the court of appeals again equates the more restrictive concept of venue with the concept of personal jurisdiction and concludes that an extraterritorial effect accomplished by use of an interstate medium is sufficient to satisfy the Section 27 venue provision that suit thereunder may be brought in any district wherein a defendant "transacts business." This approach is supported by no other reported case and, as before, tortures the basic federalism principles which provide the foundation for our constitutional system of federal-state relations by deeming state officials somehow to be "transacting business" in a commercial sense when they take action in a governmental capacity in their own states to enforce their states' laws. This Court has recently failed to recognize the "effect" test and has re-emphasized the need for commercial activity as the basis for extraterritorial suits. *Kulko v. Superior Court,* —— U.S. ——, 98 S.Ct. 1690 (1978). The cases cited by the circuit court to support this proposition nowhere meet or address this specific venue question, *Great Western United Corp. v. Kidwell,* 577 F.2d 1256, 1272 (5th Cir. 1978), and the single case cited by the district court to support this contention, *British-American Ins. Co. v.*

Lee, 403 F.Supp. 31 (D. Del. 1975), is not only wholly inapposite but also reaches the conclusion that venue is improper.

The federal-state or central-local dichotomy inherent in our polity is fundamental to the conduct of American government. Pound, *Law and Federal Government,* in FEDERALISM AS A DEMOCRATIC PROCESS 3, 12-13, 16-17 (1942); Wechsler, *The Political Safeguards of Federalism,* in PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 49, 49-50, 52 (1961). The interplay between the various omni-competent states and the national Union wherein the areas of state competency are subject to expansion and contraction by the national government's assertion of certain well defined, though often narrow, constitutional powers remains viable and precious so as to provide a continuous pattern of living and thinking ingrained in the general conduct of our Nation. As Madison early commented, constitutional powers delegated to the federal government are few and well defined, while those which remain to the states are numerous and indefinite. A. HAMILTON, J. MADISON, J. JAY, THE FEDERALIST PAPERS, No. 39, at 292 (New American Lib. ed. 1961). It would be contrary to the manner in which Congress has acted in affecting areas of omni-competence of the states, and a dangerous precedent, to presume that an Act of Congress, neutral on its face, has an intended effect in derogation of rights of states as expressed through state officials. Wechsler, *The Political Safeguards of Federalism,* in PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 49, 78-79 (1961); *Oregon v. Mitchell,* 400 U.S. 112 (1970); *National League of Cities v. Usery,* 426 U.S. 833 (1976). Yet, both the district court and court of appeals have apparently found no difficulty in sweeping away the

foundations of federal-state relations to reach unprecedented conclusions that federal courts will allow state long-arm statutes to reach to out of state officials performing, solely in their own states, governmental functions, and to apply against state officials jurisdictional and substantive conclusions under federal securities law never before reached by any other courts and far beyond the plain language of the involved federal statutes. The frightening effect that such a cavalier approach to federalism principles demonstrates is heightened when one considers the direct financial consequences broad application of *Ex parte Young* principles to reach such jurisdictional and venue conclusions will inevitably have upon state public purses when state officials are required to repair to foreign jurisdictions to defend the constitutionality of their home states' laws. To allow such a principle to become ingrained in federal jurisprudence cannot help but have the further effect of chilling the state legislative process if any potential state law must be measured in terms of what possible extraterritorial effect it may remotely have.

Changes in corporate ownership are accomplished in several ways, including sale of assets, merger, consolidation, and the like. In most types of proposed corporate change time for cautious deliberation and investigation of proposals is inherent in the process involved. Tender offers for controlling shares in the stock of a "target company" by a "raiding company" have, on the contrary, been typified by such speedy action that there is no time for deliberation and caution—and that speed is precisely what raiding companies seek to preserve. The frenetic hostile, short

duration tender offer action upon the market place for shares of corporate stock designed to produce an immediate, knee jerk response has properly been dubbed the "Saturday night special." When it became clear that some regulation was needed in the tender offer field Congress passed, effective July 28, 1968, the Williams Act amendments to the Securities Exchange Act of 1934, sections 13(d, e), 14(d-f), 15 U.S.C. §§ 78m(d, e), 78n(d-f), which merely contain reporting requirements upon companies seeking to accomplish tender offers which would result in their ownership of more than five percent of the target company's outstanding shares of stock. During the course of congressional action on the proposed amendments Congress became aware of the fact that the State of Virginia had proposed and, in fact, enacted a state corporate takeover law, effective March 5, 1968, intended to regulate the identical activity Congress sought to regulate, yet Congress chose not to include words of express preemption in the federal law. The federal law does not prevent the Saturday night special; state corporate takeover laws, of which there are presently thirty-two, do prevent this hasty, unconsidered hostile action. The Williams Act amendments have no provision for delay or for review of the information required to be reported hereunder.

The Court has recognized that "Congress, in the securities field, has not adopted a regulation system wholly apart from and exclusive of state regulation." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117, 137 (1973). See also Securities Exchange Act of 1934, § 28(a), 15 U.S.C. § 78bb(a); *SEC v. National Securities, Inc.* 393 U.S. 453, 461 (1969). Given the recognized right of states

to regulate concurrently in the securities area, a state law should be deemed to conflict with federal law for Section 28(a) purposes only when the state law makes it impossible to comply with applicable federal law. See e.g., *SEC v. National Securities, Inc.,* 393 U.S. 453 (1969); *Crosby v. Wiel,* 382 Ill. 538, 48 N.E.2d 386 (1943); Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act,* 21 Case W. Res. L. Rev. 722, 740-41 (1970); Comment, *Take-Over Bids in Virginia,* 26 Wash. & Lee L. Rev. 323, 333-34 (1970). See also *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43 (1963). At no time in the hearings before the district or circuit courts was evidence presented which indicated or implied that such a conflict creating impossibility of performance exists, and, in fact, the evidence was precisely to the contrary. For the courts to inquire merely whether Idaho law, Idaho Code §§ 30-1501 to 30-1513, might frustrate the purposes and objectives of the federal law introduces a new element of judicial scrutiny into the securities regulation field not warranted by the Securities Exchange Act of 1934 or the decisions thereunder.

Even if the right of Idaho to act in the corporate takeover field had not been preserved by Section 28(a) Idaho law does not act to frustrate accomplishment of the full purposes and objectives of Congress within the meaning of this Court's decision in *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). While there may be a difference as to purpose, such does not create a Section 28(a) "conflict." *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142 (1963). The purpose of the Williams Act amendments was set forth by their sponsor as closing "a sig-

nificant gap in investor protection under the Federal Securities laws by requiring the disclosure of pertinent information to stockholders when persons seek to obtain control of a corporation by a cash tender offer or through open market or privately negotiated purchases of securities." 113 CONG. REC. 854 (Jan. 18, 1967) (remarks of Sen. Williams). Other sources underscore the fact that the Williams Act is solely a disclosure scheme enacted for the benefit of holders of equity securities in a target company and is not designed to displace state law. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977); 113 CONG. REC. 24664 (Aug. 30, 1967) (remarks of Sen. Williams); *id.* at 857-58 (Jan. 18, 1967) (remarks of Sen. Kuchel). State takeover laws utilize the disclosure policy of the Williams Act as a starting point to supplement and complement the minimal requirements of federal law with a state law overlay which insures investor information and provides a delay factor to secure such information vital to investors in determining whether to accept a tender offer and to prevent the Saturday night special raid on a target company under which an investor has no chance, due to lack of time and limited information, to determine whether he is better off keeping or selling his equity shares. The reasoning of the courts below, however, improperly rejects the ability of states to enact different, non-conflicting statutes in the takeover area notwithstanding Congress' express authorization of such statutes under Section 28(a). The fact that the Williams Act is a disclosure statute and that the Idaho statutes may contemplate more disclosure than the Williams Act does not support the conclusion of a preemptive conflict between the federal and state laws. U.S. CONST. art. 1,

§ 8, cl. 3 & art. 6, cl. 2. While the state law may occasion delay in the tender offer, the beneficiaries of any delay are the shareholders of the target company. This fact is amply supported by the record below by testimony of witnesses for both Appellants and Appellee. The Idaho law attempts to bring into the takeover process meaningful substitutes for the usual negotiation and deliberation process that is inherent in an acquisition, merger, consolidation, sale of assets, or other change in corporate control. Though the Idaho law may slow down the takeover process and increase the likelihood that another, higher offer for the shares of stock will be obtained, such action inures to the benefit of shareholders of the target company whose elected representatives, the directors and officers of the target company, are placed in a position where they may exercise their duty to the shareholders by negotiating the best result from either the initial offeror or another suitor. Contrary to assertions by Great Western United Corp., congressional enactment of the Williams Act legislation to regulate tender offers by requiring disclosure does not create a federally authorized unfettered right to effect a takeover without regard to shareholder protections that the states have traditionally established. Though the Act of Congress occupies some field, we must know the boundaries of that field before it can be concluded that Congress has precluded a state from the exercise of powers reserved to it by the Constitution. U.S. CONST. art. 6, cl. 2; *De Canas v. Bica*, 424 U.S. 351, 360 n. 8 (1976); *quoting Hines v. Davidowitz*, 312 U.S. 52, 78 (1941) (Stone, J., dissenting). This Court's recent decision in *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), makes it clear that protection of investors, not

guarantees to takeover offerors, is the crux of the Williams Act amendments to the Securities Exchange Act of 1934.

Since the Williams Act acted in a field traditionally shared by the states (and occupied at the time of its enactment by state law in the State of Virginia) the courts below should have begun with the assumption that historic state police powers were constitutionally exercised. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); Securities Exchange Act of 1934, § 28(a), 15 U.S.C. § 78bb(a). The arguments and conclusions of the courts below are appropriate only under circumstances where Congress has not expressly or impliedly authorized state legislation. See *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945); Bikle, *The Silence of Congress*, 41 HARV. L. REV. 200, 220-21 (1927). With regard to concurrent state-federal regulation of securities markets and brokers see *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 137 (1973). See also *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific R.R. Co.*, 393 U.S. 129 (1969). The possibility of inconvenience in the exercise of state powers will not alienate and extinguish a preexisting right of state sovereignty, only an immediate constitutional impossibility can accomplish that end. U.S. CONST. art. 1, § 8, cl. 3; *Goldstein v. California*, 412 U.S. 546, 554-55 (1973). See also *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928), where this Court has balanced competing state and federal interests.

Regardless of the express authorization of section 28(a), states have an inherent right to enact takeover laws and a legitimate interest in their operation. Such statutes must carry a presumption of validity. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). See also *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 190-91 (1938), and *Brotherhood of Locomotive Firemen, etc., supra*. The Idaho law protects corporate shareholders by affording the Director of the Department of Finance, in his securities regulation capacity, the opportunity to review takeover filings for content and adequacy of disclosure, by allowing the board of directors of a target company to exercise fiduciary duties, and by giving shareholders more time and information so as to have the opportunity to make informed investment decisions not available under a Saturday night special context, and results in restoration of the rationality of negotiation to tender offer transactions. Idaho does have a legitimate interest in investor protection. *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917); *Merrick v. Halsey & Co.*, 242 U.S. 568 (1917). Because infirmities of the marketplace have caused many corporations' shares to be undervalued (as is amply supported by evidence adduced in this action), often sufficiently so as to make them vulnerable to takeover offers at bargain prices, investors are potentially subjected to a raid on a valuable asset without the immediate ability to acquire knowledge of the relative advantages or disadvantages of accepting the tender offer for their shares. A takeover is not simply an aggregate of numerous transactions in the securities of a target company. Instead, it is a surprise, hasty mass securities exchange and a corporate restructuring which

can be accomplished under other methods only by means of negotiation and deliberation wherein the interests of shareholders are safeguarded by state law and normal market processes. State law operating to regulate this process in concert with federal disclosure regulations does not create an undue burden on interstate commerce. In this instant case it can readily be seen from Deputy Administrator Baptie's letter to GWU (Appendix pp. A-156 to A-164 that Idaho did not ask onerous questions of GWU, yet the corporation declined to respond (after already voluntarily submitting to jurisdiction under the Idaho takeover law) and, instead, filed this action. The Idaho request was not incompatible with the federal law.

A further threshold issue is that of the standing of a raiding offeror under the Williams Act to bring an action under its aegis to challenge state takeover laws. Though this Court in *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), amply and at length reviewed the legislative history of the Act, the question of the Act being a grant of standing to a tender offeror in the context herein presented was not addressed in that limited holding. *Id.* at 42 n. 28. The issue is squarely raised in this action.

The fundamental jurisdictional issues involving personal jurisdiction over non-resident state officials under long-arm statutes or under the jurisdictional section of the Securities Exchange Act of 1934, the question of subject matter jurisdiction under the Securities Act, and applicability of general and Securities Act venue statutes to situations where action taken in one state has a consequential effect in the state in which venue is sought have never before been addressed by this Court.

Likewise, the questions of whether state corporate takeover laws may stand under the supremacy or commerce clauses of the United States Constitution, though often discussed and written about, and the subject of National Moot Court competition in 1976, have never reached a decisional stage by a federal trial or appellate court prior to this instant action and have not been addressed by this Court.

All these fundamental questions will recur and place a cloud over the tender offer field and action taken by state officials unless resolved by this Court. The fact of uncertainty of the right of state corporate takeover laws to exist in concert with the Williams Act is amply demonstrated by the ambivalence and indecision of the Securities Exchange Commission itself. Though the Commission participated in this instant case at the court of appeals level to argue the unconstitutionality of the state laws, it has recently in Ohio, after the circuit court decision in this case had been announced, taken a contrary position by indicating its deference to the Ohio takeover law in a takeover bid by Occidental Petroleum Corp. See Appendix hereto at pp. A-168 to A-169.

Though recognizing that resolution of the threshold standing, subject matter jurisdiction, personal jurisdiction, and venue issues *could* cause this Court to avoid or fail to reach the merits of the substantive tender offer questions, Appellants would merely point out to the Court that precedent as impressive as *Marbury v. Madison*, 1 Cranch. (5 U.S.) 138 (1803), has not earlier dissuaded this Court from addressing the merits of cases with jurisdictional defects.

Appellants would also point out to the Court the dovetailing effect that the jurisdictional issues herein regarding state officials would have with the state sovereignty issues presently before the Court by writ of certiorari in *University of Nevada, and the State of Nevada v. John Michael Hall, et al.*, No. 77-1337, October Term 1977 (U.S.S.Ct. *certiorari granted*, May 30, 1978).

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this Appeal.

Respectfully submitted,

PETER E. HEISER, JR.
SPECIAL DEPUTY ATTORNEY GENERAL OF IDAHO
Counsel for Appellants.

November 5, 1978.

(Appendix Follows)

APPENDIX

No. 77-2809.
United States Court of Appeals,
Fifth Circuit.

Great Western United Corporation,
Plaintiff-Appellee,

vs.

Wayne L. Kidwell, Attorney General of Idaho,
Defendant,
Tom D. McEldowney, Director of the Department of Finance of the State of Idaho,
Defendant-Appellant.

Aug. 10, 1978.

Appeal from the United States District Court
for the Northern District of Texas.

Before: WISDOM, GODBOLD and CLARK,
Circuit Judges.

WISDOM, Circuit Judge:

This appeal involves important issues relating to a state statute regulating corporate takeovers through tender offers. The plaintiff-appellee is Great Western United Corporation (Great Western), a publicly owned Delaware corporation with its major executive offices located in Dallas, Texas. The principal officers, all directors, and the con-

trolling shareholders of Great Western reside in Dallas. The defendant-appellant is Tom D. McEldowney, Director of the Idaho Department of Finance, charged with responsibility for enforcing the Idaho Takeover Statute, Idaho Code §§ 30-1501-13 (Cum.Supp.1977).[1]

Idaho, as well as thirty-one other states, regulates corporate takeovers through a tender offer.[2] This case pre-

[1]Wayne L. Kidwell, the Attorney General of Idaho, was also a defendant before the district court. He has chosen not to appeal to this Court.

[2]The thirty-one other statutes are Alaska Stat. §§ 45.57.010-.120 (Cum.Supp.1976) (eff. June 8, 1976); Ark.H.B. No. 546 (eff. Mar. 24, 1977); Colo.Rev.Stat. §§ 11-51.5-101 to 108 (Cum.Supp.1976) (eff. July 1, 1975); Conn.Gen.Stat.Ann. §§ 36-347a to 347m (West Supp.1976) (eff. June 1, 1976); Del.Code Ann. tit. 8, § 203 (Cum. Supp.1976) (eff. May 1, 1976); Fla.Laws ch. 77-441 (1977) (eff. Oct. 1, 1977); Ga.H.B.No. 320 (eff. Mar. 1, 1977); Haw.Rev.Stat. §§ 417E-1 to -15 (Supp.1975) (eff. May 24, 1975); Ind.Code Ann. §§ 23-2-3-1 to 12 (Burns Supp.1976) (eff. May 1, 1975); Kan.Stat. Ann. §§ 17-1276 to 1285 (1974) (eff. July 1, 1974); Ky.Rev.Stat.Ann. §§ 292.560-.630 (Baldwin Cum. Issue 1976) (eff. July 1, 1976); La. Rev.Stat.Ann. §§ 51:1500-:1512 (Cum.Supp.1977) (eff. June 28, 1976); Md.Corp. & Ass'ns Code Ann. §§ 11-901 to 908 (Cum.Supp. 1976) (eff. July 1, 1976); Mass.Laws Ann. ch. 110C, §§ 1-13 (Lawyer's Co-Op. Supp.1977) (eff. May 22, 1976); Mich.Stat.Ann. §§ 21.293(1)-(17) [M.C.L.A. §§ 451.901-451.917] (Cum.Supp.1977) (eff. July 1, 1976); Minn.Stat.Ann. §§ 80B.01 to .13 (West Cum. Supp.1977) (eff. Aug. 1, 1973); Miss.Code Ann. §§ 75-72-1 to 72-23 (Cum.Supp.1977) (eff. July 1, 1977); Neb.L.B. No. 303 (1977); Nev.Rev.Stat. §§ 78.-3776-.3778 (1973) (eff. Mar. 4, 1969); N.H.Rev. Stat. 421-A-1 to A-15 (1977); N.J.S.B. No. 808 (1977) (eff. April 27, 1977); N.Y.Bus.Corp.Law §§ 1601-1613 (McKinney Supp.1976) (eff. Nov. 1, 1976); N.C.L. ch. 781 (1977) (eff. June 28, 1977); Ohio Rev.Code Ann. § 1707.041 (Page Supp.1976) (eff. Oct. 9, 1969); Pa.Stat.Ann. tit. 70, §§ 71-85 (Purdon Supp.1977) (eff. Mar. 3, 1976); S.D.Compiled Laws Ann. §§ 47-32-1 to 47 (Supp.1977) (eff. July 1, 1975); Tenn.Code Ann. §§ 48-2101 to 2114 (Cum.Supp. 1976) (eff. Mar. 17, 1976); Tex.Reg. §§ 065.15.00.100-1700 (1977); Utah Code Ann. §§ 61-4-1 to 13 (Supp.1977) (eff. Feb. 5, 1976); Va.Code Ann. §§ 13.1-528 to 541 (Cum.Supp.1977) (eff. Mar. 5, 1968); Wis.Stat.Ann. §§ 552.01-.25 (West Spec.Pamph. 1977) (eff. July 1, 1972).

An orthodox tender offer is a publicly made invitation, usually announced in a newspaper advertisement, to all shareholders of a corporation, to tender their shares for sale at a specified price. To induce the shareholders to sell, the price usually includes a premium over the current market price of the target company's shares. Cash or other securities may be offered to the shareholders as consideration. An offer is made for a limited period of time only. An offeror may offer to buy all tendered shares, or it may offer to buy only a stated number. In general, the offeror also sets a minimum number of shares that must be tendered before he will buy any shares. The Williams Act regulates transactions other than orthodox tender offers. *See, e. g.*, Aranow, Einhorn & Berlstein, *Developments in Tender Offers for Corporate Control* 1-34 (1977). Indeed, neither Congress nor the SEC has attempted to define the term "tender offer". *Id.* at 1.

A tender offer may be used either to acquire control of a company or for nontakeover purposes. Recently, most tender offers have been for the purpose of gaining control over the target. For a more detailed description of tender offers, *see* Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 Harv.L.Rev. 1250, 1251-54 (1973); Note, *Cash Tender Offers*, 83 Harv.L.Rev. 377, 377-81 (1969), and the sources cited in the note.

sents questions whether the Idaho law, as McEldowney seeks to apply it here, may stand under the supremacy and commerce clauses of the United States Constitution and the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (the 1934 Act), as amended by the Williams Act.[3] The basic questions applicable to all state takeover statutes have never been decided by a federal court of appeals.[4] Because this suit was brought in Texas, not Idaho, the case also raises novel questions of jurisdiction and venue. The district court determined that the prerequisites of personal jurisdiction and venue were satisfied. After a hearing on the merits, the court declared the Idaho statute unconsti-

[3]Pub.L. No. 90-439, 82 Stat. 454, July 29, 1968 (embodied in §§ 13(d), 13(e), 14(d), 14(e) and 14(f); 15 U.S.C. §§ 78m(d), 78m(e), 78n(d), 78n(e), 78n(f)).

[4]In most tender offers speed is of utmost importance. Rather than accept the delay that a court challenge to state law would require, most offerors either settle their differences with incumbent management or abandon their offers. Indeed, some observers feared that the courts would never have an opportunity to rule definitively on the important questions raised in this appeal. *See, e. g.*, Sommer, *Commentary, State Takeover Statutes and New Takeover Strategies*, 32 Bus.L. 1483, 1485 (1977).

tutional because the 1934 Act preempts it and because it creates a burden on interstate commerce forbidden by article I, § 8, cl. 3 of the Constitution. *Great Western United Corp. v. Kidwell,* N.D.Tex.1977, 439 F.Supp. 420. McEldowney, joined by several states as amici,[5] strongly objects to all these rulings. We affirm the district court's rulings that personal jurisdiction existed and that venue was proper. On the merits, we agree with the position of the Securities and Exchange Commission (SEC) that the Williams Act preempts Idaho's takeover law because the state statute "presents a serious conflict with the administration of the federal program for the regulation of tender offers". SEC amicus brief at 47. We also affirm the district court's commerce clause ruling.

I.

FACTS

Sunshine Mining and Metal Co. (Sunshine) is a publicly owned company incorporated in the State of Washington. Its principal executive office and over fifty percent of its assets are located in Idaho. Sunshine has a wholly owned subsidiary with manufacturing facilities based in Maryland. In addition, Sunshine engages in significant business activities in New York. The shareholders of Sunshine live throughout the United States. Its securities are traded on the New York Stock Exchange. They are not registered in Idaho.

[5]Ohio filed a brief and participated in oral argument. Utah and New York filed briefs. Louisiana joined in Ohio's brief, and Wisconsin joined in a portion of New York's brief.

In March 1977, Great Western decided to make a tender offer for 2,000,000 shares of Sunshine common stock.[6] The tender offer of a net price of $15.75 a share was offered Sunshine shareholders across the United States. Because the tender offer was national in scope and the means and facilities of interstate commerce and the mails were necessary tools in making the tender offer, Great Western was required to comply with the provisions of the Securities Exchange Act of 1934 governing corporate tender offers.[7]

The Williams Act includes disclosure requirements, substantive restrictions on tender offers, and a general antifraud provision. It also confers broad rule-making authority upon the SEC.[8] The disclosure provisions of § 14(d)(1), 15 U.S.C. § 78n(d)(1), require specified information from any party making a tender offer which would result in that party's ownership of more than five percent of a class of equity securities registered under the 1934 Act. That information includes the purchaser's identity and background, the amount and source of the funds used for the purchase, the purpose of the purchase, any plans for liquidation, merger, or other significant changes in business or corporate structure of the target company, the

[6]On March 18, 1977, three days before it announced its tender offer, Great Western revealed that it had agreed to purchase, from the Hecla Mining Company and the Silver Dollar Mining Company, 334,070 shares of Sunshine, representing about six percent of Sunshine. In December 1976 Hecla and Silver Dollar had underwritten an unsuccessful proxy fight to oust Sunshine's management. Great Western agreed that if it successfully gained control of Sunshine, it would reimburse Hecla and Silver Dollar up to $200,000 for their proxy fight expenses.

[7]15 U.S.C. §§ 78*l*(i), 78m(d)-(e), 78n(d)-(f) (1970).

[8]Although the Williams Act has been amended, Congress has not changed the basic approach to the regulation to tender offers adopted in the original statute.

number of shares the purchaser owns, and the details of any agreements with other parties concerning shares in the target corporation.[9]

On March 21, 1977, Great Western filed a Schedule 13D with the SEC disclosing the information specified in the Williams Act.[10] The same day, Great Western publicly announced its intention to make a tender offer for 2,000,000 shares of Sunshine.

Had only the Williams Act regulated Great Western's proposed tender offer, the offer would have commenced on March 21, 1977.[11] Idaho's takeover statute, however, also applied to Great Western's offer.[12] In addition, the laws of New York and Maryland arguably applied to the offer.

Idaho's takeover law required Great Western, among other things, (1) to submit to the Director of the Idaho Department of Finance a preeffective filing disclosing Great Western's intention to make a tender offer and the

[9]The provisions of the Williams Act are summarized in Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 Harv.L.Rev. 1250, 1254-60 (1973).

[10]Schedule 13D was the disclosure form for tender offerors at the time Great Western made its offer for Sunshine. The current disclosure form for tender offerors is Schedule 14D.

[11]Sunshine filed suit against Great Western in the District of Idaho alleging violations of the Williams Act. Such a filing, however, does not automatically stop a tender offer. On April 22, 1977 the district court denied a preliminary injunction in Sunshine's Williams Act suit. The court held that Sunshine had shown neither irreparable harm nor a probability of success on the merits with regard to its claims of non-disclosure. *Sunshine Mining Co. v. Great Western United Corp.*, D.Id., 1977, [1977-78] CCH Fed.Sec.L.Rep. ¶ 96,049.

[12]Idaho Code § 30-1501(6) defines a "target company" as, among other corporations, a company with its principal office in Idaho or with substantial assets located in Idaho. Sunshine clearly fell within both these definitional requirements.

terms of the offer,[13] (2) to transmit, at the same time, a copy of that filing to Sunshine;[14] (3) to publish an advertisement describing the intention to make an offer and the proposed material terms;[15] (4) to pay the Idaho registration fee;[16] (5) to participate in a hearing, which would be mandatory if Sunshine requested one,[17] and (6) to delay its tender offer until the final determination of any administrative or injunctive proceeding brought by the Director of Finance for violation of the Idaho takeover law.[18] No time limitation is placed on whether, or when, the director must rule on the effectiveness of a registration statement.[19] The director may summarily delay the effectiveness of an offer if he determines that the registration statement is insufficient.[20] Great Western's offer would not have been subject to these requirements if the terms of the tender offer had been accepted by Sunshine's board of directors.[21]

Idaho Code § 30–1503(1) states, in part, that "It is unlawful for any person to make a take-over offer involving a target company in this state, or to acquire any equity securities of a target company pursuant to the offer, unless the offer is effective under this chapter or is exempted by rule or order of the director". As interpreted by the Idaho Department of Finance, this provision would prevent Great

[13]Idaho Code §§ 30-1503(1)-(2).

[14]Idaho Code § 30-1503(1).

[15]Idaho Code § 30-1503(1); Definitions of the Rules and Regulations for Chapter 15 of the Idaho Statutes, The Idaho Corporate Take-Over Law ¶ 6.

[16]Idaho Code § 30-1508. The fees range from $500 to $5,500.

[17]Idaho Code § 30-1503(4).

[18]Idaho Code § 30-1506(5).

[19]*See* Idaho Code §§ 30-1503, 30-1506(6).

[20]Idaho Code § 30-1503(3).

[21]Idaho Code § 30-1501(5)(e).

Western from making a tender offer to anyone in the world if it did not comply with the Idaho statute. Violations of the Idaho takeover law can result in criminal penalties of up to $5000 in fines and three years imprisonment.[22]

Great Western initially tried to comply with Idaho law. The company made informal inquiries about the Idaho requirements. On March 21, 1977, Great Western filed documents with the Idaho Commissioner of Finance in an attempt to satisfy Idaho's statute. This was the first filing ever made under the Idaho takeover law. On March 25 Melvine Baptie, then the Director of the Idaho Department of Finance, wrote Great Western raising numerous objections to the disclosure Great Western had made and asking that amendments be made. He summarily ordered a delay of the effective date of the Idaho registration and the proposed tender offer. At about the same time, Great Western's counsel in New York were advised by the New York Attorney General's office that New York was "leaning" toward asserting jurisdiction over the offer for Sunshine. In Maryland, counsel for Great Western were informed that Maryland would not comment on the applicability of its takeover law without a hearing. At this point, therefore, Great Western was faced with the problem of meeting the requirements of three state takeover statutes, each containing some provisions seemingly in conflict with the Williams Act.

Compliance with the state statutes on tender offers would have required Great Western to wait for New York and Maryland to rule on the applicability of their laws, to attempt to add the amendments proposed by Baptie, and to wait for the Idaho hearing and judicial review procedures

[22]Idaho Code § 30-1510.

to take place. To avoid this delay and also to avoid conflicting requirements, Great Western filed suit in the Northern District of Texas, on March 28, 1977, against the state officials responsible for enforcing the Idaho, New York, and Maryland takeover laws. The suit sought an order declaring that the Idaho, New York, and Maryland takeover acts were invalid insofar as they purport to apply to interstate cash tender offers for the purchase of securities traded on a national securities exchange. On April 1, 1977, the district judge issued a temporary restraining order directing the officials of the three states not to assert jurisdiction over the tender offer for Sunshine. The defendants sought emergency relief in this Court. On April 5, 1977, this Court stayed the TRO and directed the district court to make findings on personal jurisdiction and venue before deciding the merits of Great Western's complaint.

After a hearing, the district court ruled that it had personal jurisdiction over the New York and Idaho defendants and that venue was proper. The district court dismissed the claim against the Maryland defendants because it concluded that Maryland had never demonstrated an actual and present intention to enforce its statute against Great Western. The district judge refused to certify an interlocutory appeal from these rulings, and this Court denied a request by the defendants for a writ of mandamus. The case proceeded to a hearing on the merits in the district court. The trial judge issued his opinion, reported at 439 F.Supp. 420, on September 2, 1977. He dismissed the case against New York as moot because New York had informed Great Western in a letter dated May 20, 1977 that it would not assert jurisdiction over the Great Western tender offer for Sunshine. The district court held that the Idaho Take-

over Act is preempted by the Williams Act and is in violation of the commerce clause of the United States Constitution. The court granted a declaratory judgment and injunctive relief against the Idaho officials, but stayed the effect of the order to permit the defendants to file an application for a stay of the judgment. This Court denied that application on September 16, 1977, but expedited hearing of this appeal.

The district court's order, and a settlement of other litigation concerning the Great Western offer for Sunshine, allowed Great Western to acquire the desired Sunshine shares in the Fall of 1977.[23] Nevertheless, Idaho officials could take action if this Court were to reverse the district court. Idaho Code § 30–1509 would allow the officials to seek an appropriate injunction or to require rescission of the stock purchases. Despite its acquisition of 2,000,000 shares through its tender offer, Great Western does not have sufficient votes on the Sunshine Board to take advantage of the exemption from the Idaho takeover law for offers approved by the target board of directors. Therefore, the issues before us are not moot.

II.

JURISDICTION OVER THE IDAHO STATE OFFICIALS

A. Subject Matter Jurisdiction.

The district court held that subject matter jurisdiction

[23]Sunshine's Williams Act suit against Great Western was settled and dismissed by the district court on October 5, 1977, after the entry of the district court's order in the case now on appeal. The settlement provided that Great Western would offer $15 per share for up to 1,275,000 shares. Great Western also agreed to exchange securities or notes worth $15 per share for the balance of the 2,000,000 shares it had originally sought.

over Great Western's challenge to the Idaho takeover law existed under 28 U.S.C. § 1331 (federal question cases), 28 U.S.C. § 1332 (diversity cases), 28 U.S.C. § 1337 (cases based on acts regulating commerce), and 15 U.S.C. § 78aa (Section 27 of the 1934 Act). On appeal McEldowney explicitly protests only the lower court's conclusion that Great Western's complaint stated a claim under the 1934 Act and, implicitly, the conclusion that jurisdiction exists under § 1337. It is undisputed, therefore, that subject matter jurisdiction exists.

B. The Effect of Ex Parte Young.

It is hotly disputed whether a court in the Northern District of Texas could assert personal jurisdiction over the Idaho officials who enforced the Idaho takeover law. Initialy, McEldowney contends that his status as a state official means that even though he may be sued under *Ex Parte Young,* 1908, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, he may not be sued outside Idaho without his consent. He reads *Young* narrowly, to strip state officials of their "state" status *only* to allow a suit under the Eleventh Amendment. For all other purposes, so he contends, this suit is against a state.

McEldowney emphasizes that Young was sued in his own state and argues that *Young* offers no support for the proposition that a state official suable under *Young* is to be treated as any other individual litigant. Although not challenging the validity of *Ex Parte Young,* the appellant labels its result a "fiction" and suggests that the fiction should not be allowed to become fantasy. There is nothing new about characterizing *Young* as a fiction, but usually it is

termed a "necessary" fiction. L. Tribe, *American Constitutional Law,* 146 (1978). *Ex Parte Young* has become one of the cornerstones of our legal system. The Supreme Court recently refused to overrule or restrict the decision. *Rey v. Atlantic Richfield Co.,* 1978, —— U.S. ——, 98 S.Ct. 988, 994 n. 6, 55 L.Ed.2d 179. We see no reason, in policy or in the language of Justice Peckham's opinion, to limit the effect of *Young* as Idaho's Director of Finance asks us to do. The argument that *Ex Parte Young* leaves a state official with all the prerogatives of a state other than eleventh amendment immunity is undercut by the crucial paragraph in the decision:

> If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case *stripped* of his official or representative character, and is *subjected in his person* to the consequences of his individual conduct. The state has *no power* to impart to him *any* immunity from responsibility to the Supreme authority of the United States.

209 U.S. at 159—60, 28 S.Ct. at 454 (emphasis added). *See also Caldwell v. Sioux Falls Stock Yards Co.,* 1917, 242 U.S. 559, 37 S.Ct. 224, 61 L.Ed. 463. In that case the Court held that a suit challenging the South Dakota Blue Sky Law "manifestly is not one against the state".

We read *Young* to say that a state official enforcing an unconstitutional statute is an individual defendant and nothing more. Under the reasoning of *Ex Parte Young,* the state has no interest in the lawsuit, for it is incapable of authorizing an unconstitutional act. 209 U.S. at 159, 28 S.Ct. 441; Scott, *The Increased Control of State Activities by the*

Federal Courts reprinted in 3 *Selected Essays on Constitutional Law* 1077, 1084 (1938).[24] If so, the official gains no protection at all from his connection with the state on other matters. *See* Note, *Sovereign Immunity in Suits to Enjoin the Enforcement of Unconstitutional Legislation,* 50 Harv. L.Rev. 956 (1937). The dearth of previous cases where a state official has been sued outside his home state is probably attributable to the states having rarely, if ever, enacted statutes similar to the Idaho takeover law (and most other state takeover laws) that purport to extend a local official's regulatory jurisdiction to other states. If, as Idaho contends through McEldowney, the federal system is involved, then that system compels Idaho to yield to the supremacy clause.

C. Personal Jurisdiction Under the Texas Long Arm Statute.

Under Federal Rules of Civil Procedure 4(d)(7) and 4(e), personal jurisdiction in diversity cases, federal question cases, and cases involving acts affecting commerce may, if necessary, be obtained through the long arm statute of the forum state. *Wilkerson v. Fortuna Corp.,* 5 Cir. 1977. 554 F.2d 745, 747; 4 C. Wright & A. Miller, *Federal Practice & Procedure* §§ 1112, 1114 (1969). The Texas long arm statute, Tex.Rev.Civ.Stat.Ann. art. 2031b (Vernon), applies to individual as well as to corporate nonresidents. It authorizes assertion of personal jurisdiction over nonresidents to the limits of due process. *Jetco Electronic Industries, Inc. v. Gardiner,* 5 Cir. 1973, 473 F.2d 1228; *Product Promo-*

[24] Our conclusion that under *Young* the state has no interest in this lawsuit leads us to reject New York's argument that service of process must be made pursuant to Fed.R.Civ.P. 4(d)(6).

tions, Inc. v. Cousteau, 5 Cir. 1974, 495 F.2d 483; *U-Anchor Advertising, Inc. v. Burt,* Tex., 1977, 553 S.W.2d 760.

The question is whether due process permits a court in Texas to exercise jurisdiction over the Idaho official who has enforced the Idaho takeover law to prevent a Texas-based corporation from proceeding with a national tender offer. We hold that it does.[25]

The framework for our due process analysis comes from seven Supreme Court cases: *International Shoe Co. v. Washington,* 1945, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95; *Travelers Health Ass'n v. Virginia,* 1950, 339 U.S. 643, 70 S.Ct. 927, 94 L.Ed. 1154; *Perkins v. Benguet Consol. Mining Co.,* 1952, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485; *McGee v. International Life Ins. Co.,* 1957, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223; *Hanson v. Denckla,* 1958, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283; *Shaffer v. Heitner,* 1977, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683; and *Kulko v. Superior Court,* 1978, —— U.S. ——, 98 S.Ct. 1690, 56 L.Ed.2d 132. *See generally* 2 J. Moore, *Moore's Federal Practice* ¶ 4.25[2]–[4](2d ed. 1974); 4 C. Wright & A Miller, §§ 1065–67. These cases establish that

> the governing principle is the fairness of subjecting a defendant to suit in a distant forum. Only if the non-resident defendant has such "minimum contacts" with the state "that the maintenance of the suit does not offend 'traditional notions of fair plan and justice'," *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), or if the defendant has performed some act "by which [it] purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Hanson v. Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *McGee v. International Life Insurance Co.,* 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), may the forum, consistently with due process, extend its long arm to embrace it.

Jetco Electronic Industries, 473 F.2d at 1234; *See also Product Promotions, Inc.,* 495 F.2d at 494. Of necessity, inquiries into whether the exercise of personal jurisdiction is permissible in a particular case are sensitive to the facts of each case. 2 J. Moore, ¶ 4.25[5] at 1172.

The appellant argues that all his activity took place in Idaho. "Minimum contacts", however, need not arise from actual physical activity in the forum state; activities in other forums with foreseeable effects in the forum state will suffice. *See, e.g., Wilkerson v. Fortuna Corp.,* 554 F.2d at 748; *Product Promotions, Inc. v. Cousteau,* 495 F.2d at 496; *Travis v. Anthes Imperial Ltd.,* 8 Cir. 1973, 473 F.2d 515; *Eyerly Aircraft Co. v. Killian,* 5 Cir. 1969, 414 F.2d 591; *Hitt v. Nissan Motor Co., Ltd.,* 1975 S.D.Fla., 399 F. Supp. 838, *vacated on other grounds,* 5 Cir. 1977, 552 F.2d 1088; *Maricopa County v. American Petrofina, Inc.,* 1971 S.D.Cal., 322 F.Supp. 467; 4 C. Wright & A. Miller § 1069. Very little purposeful activity is necessary to satisfy the minimum contacts requirements. *Benjamin v. Western Boat Building Corp.,* 5 Cir. 1973, 472 F.2d 723, 726.

A corporation, of course, acts only through its directors and officers. When all of these directors and officers, as well as the major shareholders of the corporation, are lo-

[25] State law in this case goes to the limits of due process under the federal constitution. Accordingly, we need not discuss whether state or federal law governs amenability to suit when a state long arm statute is used to secure personal jurisdiction in a federal question case. *See* 4 C. Wright & A. Miller, *Federal Practice & Procedure* § 1075 (1969).

cated in Dallas at the time corporate decisions are made, the corporation is acting in Dallas. When the Idaho officials, through the Idaho takeover statute, asserted jurisdiction over the Great Western offer for Sunshine, they foreseeably caused efforts in Texas to comply with the Idaho state law. When the Idaho officials summarily delayed the effectiveness of Great Western's tender offer for Sunshine, they foreseeably restrained a corporation in Dallas from proceeding with its plans. In other words, the Idaho officials regulated a corporation that acts in the Northern District of Texas and through that regulation foreseeably changed the corporation's actions. These effects—effects with substantial consequences on important business plans—are more than sufficient to satisfy the minimum contacts requirement.

In *Kulko v. Superior Court,* 1978, —— U.S. ——, 98 S.Ct. 1960, 56 L.Ed.2d 132, the Supreme Court rejected an effort by a California court to assert personal jurisdiction over a non-resident on the basis of the effects his out-of-state conduct had in California. *Kulko,* however, does not change the basic approach to personal jurisdiction enunciated in prior Supreme Court decisions. It continues to recognize that the existence of personal jurisdiction turns upon the facts of each case. —— U.S. ——, 98 S.Ct. at 1694. The facts in *Kulko* are not so similar to the facts of *Great Western* that they control the outcome in our case.

The California court asserted personal jurisdiction (in a case concerning a separation agreement signed in New York) over a New York citizen solely because "by consenting to his children's living in California [with his former wife], appellant had 'caused an effect in th[e] state' warranting the exercise of jurisdiction over him". —— U.S. at ——, 98 S.Ct. at 1695, *quoting* 133 Cal.Rptr. 627, 628. The Supreme Court concluded that this effect was so insignificant that it was not reasonable for California to assert personal jurisdiction over the father. —— U.S. at ——, 98 S.Ct. at 1698-1699. It is not surprising that the Court found some effects are too insignificant to support personal jurisdiction; even physical contacts can be too insubstantial to establish personal jurisdiction. *See* —— U.S. at ——, 98 S.Ct. at 1698. That the subject matter of the underlying suit concerned domestic relations and child custody also influenced the Supreme Court's evaluation of the reasonableness of California's assertion of jurisdiction. The Court noted several times that Kulko's children expressed the wish to live with their mother and that Kulko acted in his children's best interest by honoring that preference. The Court expressed concern that a parent might hesitate to allow such moves if doing so would subject him to personal jurisdiction in a distant state. *See, e.g.,* —— U.S. at ——, ——, 98 S.Ct. at 1698, 1699.

Kulko does not hold that a court considering an *International Shoe* question may not look to effects within the forum unless the defendant's effect-producing activity causes physical injury within the forum state or affects the defendant's commercial transactions within the forum state. Justice Marshall discussed those factors to support his conclusion that the effect in *Kulko* could not support personal jurisdiction in California. He did not establish new general restrictions on the use of the effects test in the application of *International Shoe.*

The effects felt in Texas as a result of Idaho's regulation of Great Western's tender offer were more substantial than those felt in California when Kulko allowed his children to join their mother. Idaho's out-of-state regulation had the *direct* effect of stopping a substantial commercial venture based in Texas. No other state had a greater connection with that venture than Texas. In contrast, New York had more extensive connections than California with the separation agreement at issue in *Kulko.* Idaho's "business" is to regulate. It was conducting that business in Texas. Our case, therefore, is more analogous to an insurer's sending an insurance contract and premium notices into a state to an insured resident of the state than to the domestic controversy between Kulko and his former wife. *Compare McGee v. International Life Insurance Co.,* 1957, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 *with Kulko v. Superior Court,* —— U.S. at ——, 98 S.Ct. at 1699. One could also analogize the actions of Idaho's officials to the tort of intentional interference with a commercial relationship. *See* W. Prosser, *Handbook of the Law of Torts,* § 129 (4th ed. 1974). The absence in our case of the family consideration stressed by the *Kulko* Court also distinguishes the Supreme Court's recent decision.

McEldowney protests that Great Western came to him with its voluntary filing of March 21, 1977. It is true that unilateral activity by the plaintiff cannot produce the minimum contacts necessary to satisfy due process. *See Hanson v. Denckla,* 357 U.S. at 250-53, 78 S.Ct. 1228; 4 J. Moore ¶ 4.25[5]. "[W]e have, nevertheless, unequivocally required *some* activity by the defendant . . . ." *Benjamin v. Western Boat Building Corp.,* 472 F.2. at 726 (emphasis

in original). In *Hanson v. Denckla,* a Florida court asserted jurisdiction over a Delaware Trust Company. The only connection asserted between the Company and Florida occurred because the trustee, who had created the trust in Delaware, moved to Florida where she received some trust income and engaged in various acts of trust administration. The Trust Company had nothing to do with the trustee's decision to move. The case before us is different. It may be true that Great Western came to Idaho with a filing. It is also true that Great Western had little choice; the alternative for its officers was to risk criminal penalties under Idaho Code 30-1510. The first step in the sequence came not from Texas, but from Idaho, where the filing requirement binding on Great Western was created. Furthermore, Idaho's regulatory activities after the filing, including the order delaying the effectiveness of the tender offer, constituted affirmative action by Idaho officials causing foreseeable effects in Texas. The decision to issue a regulatory order having inevitable extraterritorial effects cannot be compared with the routine remission of trust receipts to a trustee who has moved to another state.[26]

McEldowney stresses language from *Hanson v. Denckla* that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State,

[26]The Supreme Court's *Kulko* opinion expresses some concern that allowing jurisdiction in *Kulko* might undermine the principle that a plaintiff cannot unilaterally create the contacts that support personal jurisdiction. The Court points out that the plaintiff-mother moved to California, and that the defendant-father did no more than acquiesce in his children's move to the West Coast. That personal jurisdiction in this case is clearly based on actions by the defendants further distinguishes *Kulko.*

thus invoking the benefits and protections of its laws". 357 U.S. at 253, 78 S.Ct. at 1240. The Idaho official denies that he did such an act.

Judge Goldberg, after a thorough study of the Supreme Court cases, concluded that this language "should not be read too literally" and that essentially it reflects the Court's rule that unilateral action by the plaintiff cannot create the necessary relationship between the defendant and the forum state. *Product Promotions, Inc. v. Cousteau,* 495 F.2d at 496.[27] Personal jurisdiction has been found to exist over price fixing conspirators whose illegal activities in one state were designed to control prices in the forum state. *Hitt v. Nissan Motor Co., Ltd.,* 1975 S.D.Fla., 399 F.Supp. 838, *vacated on other grounds,* 5 Cir. 1977, 552 F.2d 1088; *Maricopa County v. American Petrofina, Inc.,* 1971 S.D.Cal., 322 F.Supp. 467. Those conspirators, of course, had not invoked the benefits and protections of the forum states' laws in a restrictive sense.

Even if we were to read the requirement of *Hanson v. Denckla* more literally, it would be satisfied in this case. The activities of the defendant officials were to regulate tender offers. The impact of their regulation was felt in Texas, as they intended it to be. Thus, they did conduct activities in Texas. If Great Western had failed to comply with the Idaho takeover law, and the Idaho officials had

[27]By following *Product Promotion's* interpretation of *Hanson v. Denckla* we do not hold, as the dissent suggests we do, that *Hanson v. Denckla's* requirement that a defendant purposefully avail himself of the benefit of state law has been eliminated. None of the cases cited in the dissent conflict with *Product Promotion's* holding that the *Hanson v. Denckla* language should be read as a restatement of the due process rule that the defendant must create sufficient contacts with the forum before a state may assert personal jurisdiction over him.

obtained criminal sanctions, no doubt the state officials would have expected Texas to honor those criminal judgments. Indeed, if the Texas courts did not, the sanctions might have little effect since none of Great Western's officers reside in Idaho. Idaho might also ask for Texan help if violators of the takeover residing in Texas refused to go to Idaho for trial. Idaho was depending, at least in part, upon Texan cooperation to make its enforcement mechanism effective.[28]

The most fundamental difference between the dissenting and majority opinions in this case arises over the requirement of the Supreme Court cases that an assertion of personal jurisdiction not "offend traditional notions of justice and fair play". Questions of reasonableness are invariably ones of judgment where "[t]he greys are dominant and even among them the shades are innumerable". *Kulko v. Superior Court,* —— U.S. at ——, 98 S.Ct. 1695, 1697. In

[28]This discussion is to satisfy those who insist that the *Hanson v. Denckla* language about a defendant's availing himself of the benefit of the forum's laws establishes an independent test. It is possible to envision a role for Texas in the enforcement of Idaho's statute. As the dissent points out, this role becomes an active one only if Idaho tries to enforce its law in certain circumstances, such as against Texas defendants who refuse to leave Texas and return to Idaho. The dissent's major objection to this discussion is that it makes the *Hanson v. Denckla* requirement too easy to satisfy, not that it is impossible to envision a role for Texas in the enforcement of Idaho's law. The dissent fears that governors, state prosecutors, and other state regulatory officials will be subject to countless out-of-state civil suits simply because they might at one time rely upon another state's extradition procedures for the full faith and credit clause of the Constitution. Governors, state prosecutors and other state regulatory officials need fear no such outcome from the majority opinion. That a defendant in some manner benefits from a state's laws does not *automatically* mean that *International Shoe's* due process requirements, are satisfied. That benefit is only one factor for a court to consider, and it is a factor to discount if the benefit is attenuated or speculative. Jurisdiction over the Idaho officials in Great Western's suit is supported by much more than Idaho's possible need for Texan help with the enforcement of the penalties in its takeover law.

its evaluation, the dissent gives too little emphasis to the uniqueness of the state takeover laws. Idaho's statute seeks to regulate the sale of a security even when neither the buyer nor the seller nor the sale itself has *any* connection with Idaho. *See generally* Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act,* 21 Case Wes.Res.L. Rev. 722, 756 (1970). The Idaho officials deliberately cast their regulatory net across the United States. They knew those regulations would entangle transactions with no connection to Idaho. It is not unfair or unreasonable to require an Idaho official to travel from his home when one of the participants in a non-Idaho transaction challenges the constitutionality of Idaho's interference. Although the Idaho officials may have been inconvenienced by the need to appear in Texas, they had ample resources to do so.

The state officials and the dissent argue that it is unreasonable for a court in Dallas to assert personal jurisdiction over the defendants in this case because doing so will lead to numerous other out-of-state suits against state officials who enforce other state regulations with interstate impact. One paragraph, in particular, of the district court's memorandum order disturbs McEldowney:

> The practical effect of the Idaho defendants' actions is to regulate business activities of Great Western and the investment opportunities of shareholders of Sunshine in Texas and every other state. The court does not therefore find it unfair to make the Idaho defendants appear where the predictable consequences of their purposeful actions are felt.

439 F.Supp. at 433 (footnote omitted). McEldowney reads this paragraph to mean that personal jurisdiction over a

state official is reasonable and proper whenever the statute he enforces has a "practical effect" in a forum state.

This would, indeed, be an expansive construction. We consider this to be an unfair reading of the district court's opinion; nor is such a holding necessary to justify personal jurisdiction in this case. In our view, the crucial conclusion in the quoted paragraph is not that the actions of the Idaho defendant under the Idaho takeover law had a "practical effect" in Texas, but that they amounted to the regulation of Great Western's Texas-based business activities. Because we have concluded that this extraterritorial regulation provides the necessary contacts with Texas, we need not rely upon the district court's further and broader conclusion that impact on shareholders also provides the contacts necessary to satisfy due process.

The contention that our holding will permit countless other out-of-state lawsuits against state officials ignores the concededly unique characteristics of state takeover laws such as Idaho's. We do not share the dissent's difficulty distinguishing the Idaho takeover statute from other regulations. In none of the examples it cites is there a comparable lack of *any* connection between all parties to a transaction, as well as the transaction itself, and the regulating state. For instance, it is true that the California pollution law impacts out-of-state automobile manufacturers. But it is also true that almost all the customers who buy and drive those cars are California residents. Blue Sky laws—in notable contrast to the Idaho takeover law—regulate only sales of securities within the regulating state. Insurance laws have a similarly limited scope. Business

qualification regulations affect only companies that wish to operate within the regulating state. And food purity laws cover only sales of food to customers within the regulating state. When, as in these examples, the regulating state has a substantial connection with at least one side of a regulated transaction, it may be unreasonable to require state officials to defend their regulations in out-of-state forums even though there are foreseeable effects in a foreign state sufficient to satisfy the minimum contacts branch of *International Shoe's* requirements. That, however, is simply not the situation in this case.

D. Section 27 of the 1934 Act.

Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa(1970), provides in relevant part:

> Any criminal proceeding [under the Act] may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

Under the final clause, a federal court has jurisdiction over the person of a defendant in an action under the 1934 Act so long as the manner of service is proper and constitutional limits on extraterritorial service are respected. *A.L. Black v. Acme Markets, Inc.*, 5 Cir. 1977, 564 F.2d 681.

The manner of service is not contested on appeal; we have already held that any constitutional limits on extraterritorial service have been respected.[29] If Great Western's complaint states a claim under the 1934 Act, § 27 provides another basis for personal jurisdiction.

Section 28 of the 1934 Act, 15 U.S.C. § 78bb (1970) is helpful to Great Western. That section provides in relevant part:

> Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

This language impliedly prohibits a state official from enforcing a statute that conflicts with the 1934 Act. Great Western's claim that the Idaho takeover law conflicts with the Williams Act, therefore, appears to state a claim under § 28.

McEldowney responds that the only possible claims under the 1934 Act are those to prevent and punish fraud in the purchase and sale of securities. Section 28 prohibits no conduct; to the contrary, it preserves the right of states to regulate. Finally, he argues that Great Western's construction of § 28 would mean that by enforcing the Idaho takeover law the state officials "violated" the 1934 Act and became subject to criminal penalties under § 32, 15 U.S.C.

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[29]Because we have found the *International Shoe* requirements to be satisfied, we, like the court in *Black v. Acme Markets, Inc.* may defer the question whether those requirements apply to federal courts sitting in federal question cases brought under statutes providing for worldwide service of process. *See* Judge Goldberg's discussion in *Black*, 564 F.2d at 686 n. 8.

§ 78ff(a)(1970).[30] Since Congress could not have intended to make such conduct criminal, McEldowney concludes that enforcement of a law that conflicts with the 1934 Act cannot be a violation of that Act, and that § 28 is not relevant to this proceeding. Great Western's contention, he argues, is one under the supremacy clause of the Constitution, not under the 1934 Act.

The attempted distinction between § 28 and the supremacy clause is not persuasive. Section 28 essentially restates the supremacy clause, making it a statutory as well as a constitutional requirement. *See* Aranow, Einhorn & Berlstein, *Developments in Tender Offers for Corporate Control* 225 (1977). Thomas Corcoran, one of the principal draftsmen of the 1934 Act, pointed out to the Senate Committee on Banking and Currency that § 28 stated a rule that is true of any federal statute because of constitutional requirements. Senate Committee on Banking and Currency, *Stock Exchange Practices: Hearings on S. Res. 84 (72d Cong.) and S. Res. 56 and S. Res. 97 (73d Cong.) pt. 15, National Securities Exchange Act of 1934*, 73d Cong., 1st Sess. 6577 (1934). Nor is the lack of prohibitory language in § 28 significant. The commerce clause, for instance, is written only as an affirmative grant of power to Congress. Without any difficulty, courts find that the language also imposes self-executing limitations on regulation by the

[30]Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter . . . shall upon conviction be fined not more than $10,000, or imprisoned not more than two years or both . . . but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

states. *E. g.*, P. Brest, *Processes of Constitutional Decisionmaking* 206 (1975). Finally, the absence of previous cases relying upon § 28 to invalidate a state law is not controlling. As we have already noted, the state takeover laws pose highly unusual, if not unique, questions in the subject of securities regulation.

To interpret § 28 to require states not to enact or enforce laws that conflict with the 1934 Act and to hold that § 27 applies to a suit to enforce that requirement is not to subject officials of states with offending statutes to the risk of imprisonment or fine. McEldowney argues that "violation" is the key word in § 27, and that an act that is a "violation" in § 27 terms is automatically within the scope of § 32(a) criminal liability. The SEC, in oral argument, suggested that a suit based on § 28 would be one to enforce a duty created by the 1934 Act and that the concept of a "violation" would not be relevant.

It is not necessary to parse § 27 to determine if this distinction between a "violation" of the 1934 Act and a failure to honor a "duty" created by the Act is valid.[31] Even if

[31]Our impression, however, is that the SEC is correct. The first sentence of § 27 provides "The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, *and* of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder." (Emphasis added). This sentence supports the SEC's argument, for it draws a clear distinction between violations and suits to enforce a duty created by the 1934 Act. One difficulty with the SEC's construction of the statute is that the sentence of § 27 establishing jurisdiction and venue over suits to enforce a duty created by the 1934 Act refers back to the preceding sentence that is cast in terms of "violations".

"violation" is the key word in § 27, that word has not been interpreted in the manner urged by Idaho's Director of Finance. The most helpful authority comes from § 16(b) cases.

Section 16(b), 15 U.S.C. § 73p(b) (1970), allows a corporation to recover any profit realized by a corporate insider from short swing trading in the corporation's stock.[32] Nothing in the 1934 Act directly forbids short swing trading by insiders. Instead, such an obligation has been inferred from the profit recapture provision. *E. g., Gratz v. Claughton,* 2 Cir. 1951, 187 F.2d 46, 49 (L. Hand, J.), *cert. denied,* 341 U.S. 920, 71 S.Ct. 741, 95 L.Ed. 1353. Short swing trades are not made unlawful by § 16(b) in the sense that they can result in an indictment. II L. Loss, *Securities Regulation* 1044 (1961). Nevertheless, engaging in short swing trading is a "violation" for § 27 purposes. *Gratz v. Claughton,* 187 F.2d at 49; *Grossman v. Young,* 1947 S.D.N.Y., 70 F.Supp. 970, *petition for prohibition and mandamus denied sub nom. Young v. Rifkind,* 2 Cir., Oct. 13, 1947.

Enforcement of a duty not to make short swing trades fulfills the purpose of § 16(b). *Gratz v. Claughton,* 187 F.2d at 49. Similarly, recognition of a duty not to pass or enforce laws that conflict with the 1934 Act would fulfill the purposes of § 28. Like the duty not to make short swing trades, this duty would not be enforceable through criminal sanctions, but could be violated for purposes of § 27.

We conclude that the wording of § 28 and the legislative

[32]A short swing trade occurs when the purchase and sale of the security occur within six months. *See generally* II L. Loss, *Securities Regulation* 1040-1132 (1961).

history of the 1934 Act show that § 28 was an attempt to incorporate the supremacy clause into the securities laws. Congress, of course, is free to do this. We hold that Great Western stated a claim based on the 1934 Act, and that § 27 is an independent source of personal jurisdiction over the Idaho officials.

III.

VENUE

A. The 1934 Act.

Section 27 of the 1934 Act provides for venue as well as personal jurisdiction. Venue is proper in any district where acts constituting part of the alleged violation of the 1934 Act occurred. The alleged violation consists of enforcing an invalid statute. The regulatory activities by the Idaho officials had their restraining effect at the corporate headquarters of Great Western in Dallas. This was a sufficient act to make venue proper in the Northern District of Texas. *See Travis v. Anthes Imperial Limited,* 8 Cir. 1973, 473 F.2d 515. In addition, Idaho officials sent at least one interstate letter into Texas as part of their regulatory effort. The letter from Baptie outlining his objections to Great Western's filing and announcing that the effective date of the offer would be summarily delayed was more than a trivial part of the interference by Idaho officials with Great Western's securities transactions. Such interstate communication into the forum makes venue proper under § 27. *See, e. g., Hilgeman v. National Insurance Co.,* 5 Cir. 1977, 547 F.2d 298; *Mayer v. Development Co.,* 1975 D.Del., 398 F.Supp. 917.

B. 28 U.S.C. § 1391(b).

Because subject matter jurisdiction in this case is not based solely upon diversity of citizenship, the applicable general venue statute is 28 U.S.C. § 1391(b).

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

The district court followed the rule that a claim can arise in only one district for § 1391 venue purposes. It held that for § 1391 purposes the claim arose in Idaho, and that venue was not proper under the general statute. 439 F.Supp. at 433. We disagree.

The language of 28 U.S.C. § 1391 can be read to provide that a claim may arise, as a matter of law, in only one district. *See, e. g.,* 15 C. Wright, A Miller & E. Cooper, *Federal Practice & Procedure: Jurisdiction* § 3806 at 28-29 (1976). Commentators have recognized, however, that a preferable approach would be to equate the availability of compulsory process on a nonresident and proper venue under § 1391. *Id.* at 29; 1 J. Moore ¶ 0.142[5.—2] at 1430. Professor Moore's view is that the current statute can be read to follow such an approach, although he admits this reading is not without difficulty. 1 J. Moore ¶ 0.142[5.—2] at 1431-32. Some courts have moved toward an expansive reading of § 1391. *See, e. g., Gardner Engineering Corp. v. Page Engineering Co.,* 8 Cir. 1973, 484 F.2d 27, 33; *Carter-Wallace, Inc. v. Ever-Dry Corp.,* S.D.N.Y. 1968, 290 F.Supp. 735, 739; 15 C. Wright, A. Miller & E. Cooper § 3806 at 29 n. 18; 1 J. Moore ¶ 0.142[5.—2] at 1433. Our

conclusion that the Idaho officials had sufficient contacts with the Northern District of Texas to make compulsory process available means that venue would be proper under § 1391(b) if the expansive interpretation of the venue statute is adopted.

We may leave that decision for another day, because even if Great Western's claim can arise in only one district, we conclude that the proper district is the Northern District of Texas, not the District of Idaho.[33] The core of Great Western's claim is that the Idaho officials invalidly prevented Great Western from initiating a tender offer for Sunshine. The offer was initiated in Dallas, Texas. If there is a single place where the allegedly invalid restraint occurred, that place is Dallas.[34] Although the result of Idaho's regulation was that Great Western could not make an offer to Sunshine shareholders who reside in districts throughout the country, the place of restraint, and thus the place where Idaho officials injured Great Western, was in Dallas.[35]

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[33]Even though we conclude that Great Western's claim arose in Texas, venue would have been proper in Idaho as well because that is the judicial district where all defendants reside. *But see* text after note 35 discussing venue in a suit against officials from more than one state.

[34]*Cf.* the suggested rules that a tort claim arises where the injury occurs, not where the negligent act takes place and that a contract claim arises where the contract is to be performed, not in the district where it was written. 1 J. Moore ¶ 0.142[5.—2] at 1434-35 (1977).

[35]The district court erred, in our opinion, by analyzing the alleged violation as a restraint upon Sunshine shareholders who would have tendered rather than as interference with Great Western's plans. That analysis led the district court to conclude that the claim did not arise in Texas because it could be argued equally well that the claim arose in any district where a Sunshine shareholder resided. We might note that an alternative to this conclusion would have been that each restraint of a Sunshine shareholder constituted a separate claim that arose only in the district where that particular shareholder lived.

That the Northern District of Texas is the district where the claim arose, if there can be only one such district, becomes clearer if one notes that New York and Maryland also might have asserted jurisdiction over Great Western's offer. In that event, there would have been no district where all the defendants resided. The apparent purpose of the amendments to §1391, adding the "in which the claim arose" language, was "to assure that at least one venue . . . will be proper as to *all* defendants . . . in a multi-party action". 1 J. Moore ¶ 0.142[5.—2] at 1434 (emphasis added). There is no reason to conclude that the claim against New York or Maryland arose in Idaho. The district judge would have placed the claim in Idaho only because Idaho was the source of the power exerted extraterritorially. Idaho would not have been the source of New York's or Maryland's power. In contrast, if New York or Maryland officials had asserted jurisdiction, the reasons why we believe Great Western's claim against the Idaho officials arose in Dallas would equally apply to them, and a single suit would have been possible.

In summary, on the questions whether the requirements of personal jurisdiction and venue are satisfied, we hold that both are met.[36] Personal jurisdiction existed under the Texas long arm statute, as made applicable by the Federal Rules of Civil Procedure, and the requirements of due process. Personal jurisdiction also existed by virtue of

[36]Several of the amici contend that we should refrain from deciding this case under the *Pullman* and *Younger* abstention doctrines. McEldowney did not raise this point before the district court; nor does he argue it to us. This is not an appropriate case for abstention under either doctrine.

§ 27 of the 1934 Act. Venue is proper under both § 27 of the 1934 Act and 28 U.S.C. § 1391(b).[37]

IV.

PREEMPTION

A. The Legal Criteria.

We now proceed to the district court's substantive holding that federal securities regulation preempts the Idaho statute.

No simple, mechanical formula can summarize the analysis necessary to determine whether a state statute is void under the supremacy clause, U.S.Const. art. I, § 10. *See Goldstein v. California,* 1973, 412 U.S. 546, 561, 93 S.Ct. 2303, 37 L.Ed.2d 163; *Hines v. Davidowitz,* 1941, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581. The nature of a court's inquiries as to this question has been established in earlier cases. The Supreme Court summarized these inquiries in *Jones v. Rath Packing Co.*, 1977, 430 U.S. 519, 525-26, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604:

> The first inquiry is whether Congress, pursuant to its power to regulate commerce, U.S.Const., Art. 1, § 8, has prohibited state regulation of the particular aspects of commerce involved in this case. . . . [W]hen Congress has "unmistakably . . . ordained," *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must

[37]To the extent our discussion rests on an anticipation of the merits of the case, we rely on the principle that we have jurisdiction to determine so much of the merits as is necessary to decide a jurisdictional dispute. *See, e. g., United States v. United Mine Workers,* 1947, 330 U.S. 258, S.Ct. 677, 91 L.Ed. 884.

fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633, 93 S.Ct. 1854, 1859, 36 L.Ed.2d 547 (1973); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. [218,] 230, 67 S.Ct. 1152, [91 L.Ed. 1447] [1947].[38]

Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U.S.Const., Art. VI. The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is "to determine whether, under the circumstances of this particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 339, 404, 85 L.Ed. 581 (1940). Accord, *De Canas v. Bica*, 424 U.S. 351, 363, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976); *Perez v. Campbell*, 402 U.S. 637, 649, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971); *Florida Lime & Avocado Growers v. Paul, supra*, at 141, 83 S.Ct. at 1217; *id.* at 165, 83 S.Ct. at 1229 (White, J., dissenting). This inquiry requires us to

[38] In *Rice*, the Court discussed some circumstances that show an implicit Congressional desire to preempt all state regulation in a given field:

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the state to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.

Rice v. Santa Fe Elevator Corp., 1947, 331 U.S. 218, 229-30, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447. *Accord, Pennsylvania v. Nelson*, 1956, 350 U.S. 497, 502-05, 76 S.Ct. 477, 100 L.Ed. 640.

> consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written. See *De Canas v. Bica, supra*, 424 U.S. at 363-365, 96 S.Ct. at 940-941; *Swift & Co. v. Wickham*, 230 F.Supp. 398, 408 (S.D.N.Y.1964), appeal dismissed, 382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965), aff'd on further consideration, 364 F.2d 241 (CA 2 1966), cert. denied, 385 U.S. 1036, 87 S.Ct. 776, 17 L.Ed.2d 683 (1967).

Nothing in the 1934 Act explicitly preempts all state takeover legislation; indeed, § 28 has a contrary tone. We need not reach the question whether Congress implicitly ruled out all state legislation of tender offers when it amended the 1934 Act with the Williams Act. We rely instead on the principles in the second paragraph quoted from *Jones*, and hold that the particular takeover law before us cannot stand because it conflicts with the federal statute. In the words of *Hines*, "it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress".

McEldowney relies heavily on the words of § 28 to argue that the Idaho statute is not preempted. This argument applies to both the supremacy clause and to § 28 in that § 28, according to McEldowney, is an express congressional instruction on how to apply the supremacy clause. Appellant's brief at 29-30. This analysis, like ours, focuses on the question whether the Idaho statute "conflicts" with the Williams Act. McEldowney argues further, however, that a "conflict" in this context exists only if it is impossible to meet both federal and state requirements. Because of this

he argues flatly that "[t]he test set out in *Hines* is not relevant". Appellant's brief at 30.[39]

We do not accept this narrow definition of "conflict", nor the dismissal of the *Hines* test. Therefore, although several provisions of the Idaho statute arguably contradict specific provisions of the federal law, we shall not focus on those inconsistencies nor decide whether they would be sufficient to preempt Idaho's law under McEldowney's suggested analysis.[40]

[39]We disagree with the appellant that § 28 sets forth a different test from the test required by the supremacy clause. Nevertheless, we should point out that *Jones v. Rath Packing Co.* casts doubt on McEldowney's assertion that § 28, if interpreted in the narrow way he urges, would eliminate the need to apply the *Hines* test. In *Jones*, the Court interpreted a provision of the Fair Packaging and Labeling Act, 15 U.S.C. § 1461 (1970), to explicitly pre-empt state law only when compliance with state law would automatically trigger federal enforcement action. 430 U.S. at 540, 97 S.Ct. 1305. The California statute challenged in the *Jones* litigation was not pre-empted under that standard. *Id.* The Court went on, however, to apply *Hines* to the California law, and ruled that under *Hines* the state law was invalid. 430 U.S. at 543, 97 S.Ct. 1305. *See also* Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 Stan.L.Rev. 208, 212-15 (1959) where the author discusses how the courts have paid slight attention to general savings clauses in pre-emption cases.

In addition, § 28 arguably does not apply to state takeover statutes. Section 28 was part of the original 1934 Act. It was designed to preserve state Blue Sky laws, which were well established before 1934. In contrast, when Congress enacted the Williams Act only Virginia had a takeover law, and it was enacted just before Congress passed the bill. There is no mention of state legislation in the Senate or House hearings. When subsequent state legislation is not of substantially the same character as the laws Congress intended to save, the savings clause may not save the subsequent state laws. *See* Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competence*, 62 Cornell L.Q. 213, 247 (1977) and sources cited therein.

[40]For instance, the SEC points out that precommencement publication under Idaho Code § 30-1503(1) could arguably be deemed publication to security holders within the meaning of § 14(d)(1) of the Williams Act. SEC amicus brief at 40 n. 137. If so, the ten day period of § 14(d)(6), the provision requiring an officer to purchase

The appellant's definition of "conflict" is too narrow for the usual preemption test; *Jones* unambiguously reaffirms that in general the *Hines* test rather than a more limited examination for contradictions is the proper one. *Jones v. Rath Packing Co.*, 430 U.S. at 526, 97 S.Ct. 1305. Nor does any reason appear to give the term "conflict" a special limited meaning in § 28 of the 1934 Act. The language of the section does not compel such unusual interpretation. The cases and administrative authorities cited in the appellant's brief at best support the narrow definition obliquely, and all are in distinguishable contexts.[41] The SEC, in its role

on a pro rata basis the shares tendered during the first ten days of an offer if too many shares are tendered, would begin. Idaho has a similar provision, Idaho Code 30-1506(3), but its ten day period begins only after the offer is effective under Idaho law. As a result, the Williams Act rights of a shareholder tendering during the first ten days of the federal counting period might be diluted. *See* Aranow, Einhorn & Berlstein, *Developments in Tender Offers for Corporate Control* 227 (1977). A similar argument can be made about withdrawal privileges. Section 14(d)(5) and Idaho Code 30-1506(2) both make tenders irrevocable between the eighth and sixtieth day of an offer. If the offer is deemed to commence on a different day, however, the two time periods conflict. *See id.*

In addition, Great Western contends that Idaho Code 30-1503 requires offerors to disclose projections that would not be allowed under federal standards because the projections are too uncertain. Tr. at 163.

[41]*SEC v. National Securities, Inc.*, 1968, 393 U.S. 453, 89 S.Ct. 564, 21 L.Ed.2d 668 involved not the 1934 Act, but the very different McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, dealing with the regulation of the business of insurance by state or federal law. The language of the case is also not as helpful as the appellant's brief suggests.

Several other cases, including *Travelers Health Ass'n v. Virginia*, 1950, 339 U.S. 643, 70 S.Ct. 927, 94 L.Ed. 1154 and *Crosby v. Weil*, 1943, 382 Ill. 538, 48 N.E.2d 386, are inapposite because they concern state Blue Sky laws. These statutes are very different from the takeover laws, and they involve matters traditionally within the province of state law. *See also* footnote 39.

Two two cited Investment Advisors Act releases concern a different statute. They also represent the opinion of the SEC, which has

as an amicus curiae in the case, rejects such a narrow reading. SEC amicus brief at 45–47. This administrative interpretation is entitled to deference. *See Fawcus Machine Co. v. United States,* 1931, 282 U.S. 375, 51 S.Ct. 144, 75 L.Ed. 397; Hart & Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1340-47 (tent. ed. 1958); Note, *Preemption as a Preferential Ground: A New Canon of Construction,* 12 Stan.L.Rev. 208, 216-17 (1959). Finally, the legislative materials discussed in Part III of this opinion show that the draftsmen of § 28 intended to restate the supremacy clause. That being so, there is no reason to substitute a narrow meaning of "conflict" for that enunciated by the Supreme Court in *Hines, Jones,* and other cases.

B. The Conflict Between the Idaho Takeover Statute and the Williams Act.

The underlying purpose of the Williams Act is to protect investors. *Piper v. Chris-Craft Industries, Inc.,* 1977, 430 U.S. 1, 97 S.Ct. 926, 51 L.Ed.2d 124. Congress chose this goal in the Williams Act and adopted a distinct means of achieving it. Essentially, Congress relied upon a "market approach" to investor protection. The function of federal regulation is to get information to the investor by allowing both the offeror and the incumbent managers of a target company to present fully their arguments and then to let the investor decide for himself.[42] In identical

rejected the narrow reading of "conflict" in its brief for this case. Finally, the language of the releases offers no substantial support for the appellant's point. They only note in passing that state requirements not in conflict with federal law are valid. They do not define "conflict".

[42]Hearings on H.R. 14475, S.510 Before the Subcommittee on Commerce and Finance, 90th Cong. 2d Sess. 4, 47-48 (1968) (House

language the Senate and House Reports explained, "This bill is designed to make the relevant facts known so that shareholders have a fair opportunity to make their decision".[43] In *Rondeau v. Mosinee Paper Corp.,* 1975, 422 U.S. 49, 58, 95 S.Ct. 2069, 45 L.Ed.2d 12, the Supreme Court noted that Congress wanted to give each side an opportunity to express and explain its position without giving target management a weapon against takeover bids. *See also, Humana, Inc. v. American Medicorp., Inc.,* S.D.N.Y. 1978, 445 F.Supp. 613.

The reason for this approach was congressional recognition that tender offers often benefit an investor and that a statute preventing tender offers could harm, rather than protect, investors. *E.g.,* S.Rep.No. 550, 90th Cong., 1st Sess. at 3 (1967) (Senate Report); H.R.Rep.No.1711, 90th Cong., 2d Sess. at 3 (1968) (House Report); U.S.Code Cong. & Admin.News 1968, p. 2811. The original bill to amend the 1934 Act, S. 2731, introduced in 1965, sought to protect investors by making it difficult for tender offers to succeed. *See* 111 Cong.Rec. 28257–28259 (1965).[44] This ap-

Hearings); Hearings on S. 510 Before the Subcommittee on Banking and Commerce, 90th Cong. 1st Sess. 17, 19, 25, 182 (1967) (Senate Hearings) (statements of Mr. Cohen), 113 Cong.Rec. 854; Cohen, *Takeover Bids,* Speech to the Association of the Bar of the City of New York, reprinted at Senate Hearings at 204-05; Note, *Commerce Clause Limitations upon State Regulation of Tender Offers,* 47 S.Cal.L.Rev. 1133, 1146 (1974).

[43]S.Rep.No.550, 90th Cong. 1st Sess. 3 (1967); H.R.Rep.No.1711, 90th Cong. 2d Sess. 3 (1968); U.S.Code Cong. & Admin.News 1968, p. 2813.

[44]S. 2731 would have subjected some tender offerors and persons associated with an offeror to the reporting and short swing profit liability provisions on § 16 of the 1934 Act. It would have required persons making cash tender offers and certain other securities acquisitions to make advance disclosure and filings. It also would have granted rulemaking authority to the SEC on the subject of a corporation's purchase of its own securities.

proach attracted considerable opposition, including that of the SEC.[45]

As a result, Congress amended the draft bill to make it less burdensome to offerors. A cornerstone of the revised approach to investor protection was the law's deliberate neutrality among the contestants in a tender offer. The Senate Report explained:

> The committee has taken extreme care to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. The bill is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case.

Senate Report at 3. Virtually identical language appears in the House Report at 3. The Supreme Court has already drawn attention to this language and to the intent of Congress not to take sides in tender offers. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. at 30–31, 97 S.Ct. 926; *Rondeau v. Mosinee Paper Corp.*, 422 U.S. at 58–59, 95 S.Ct. 2069.

Of course, this language does not mean Great Western has a right under the Williams Act to complete its tender offer successfully. *See Piper v. Chris-Craft Industries, Inc.*, 430 U.S. at 34–35, 97 S.Ct. 926. Instead, it creates the investor's right to hear a fair presentation of the offeror's proposal. This investor's right can be carried out, however, only by avoiding regulation that puts the offeror at a disadvantage to incumbent management. Congress recognized

[45] *See* 112 Cong.Rec. 19003 (1966); Senate Hearings at 123 (statements of Prof. Painter and Sen. Williams), 133-34 (statement of Prof. Kaplan).

that delay can seriously impede a tender offer. Senate Report at 5. It rejected legal requirements, such as precommencement review by the SEC, that could delay offers unnecessarily. *Id.* Such delay could prevent the offeror from fairly presenting its case.

In its consideration of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C.A. § 18a (Supp.1977), Congress recently reaffirmed the choice of a market approach to investor protection in the tender offer area, as well as the importance of legal neutrality between offerors and incumbent management to carry out this protection. Congress also reaffirmed its view that regulatory provisions producing more than minimal delay could upset this neutrality. The House Report stated:

> it is clear that this short waiting period [referring to the 10 days required by the Williams Act] was founded on congressional concern that a longer delay might unduly favor the target firm's incumbent management and permit them to frustrate many pro-competitive cash tenders. This 10-day waiting period, thus underscores the basic purpose of the Williams Act—to maintain a neutral policy toward cash tender offers, by avoiding lengthy delay that might discourage their chances for success.

H.R.Rep.No.94–1373, 94th Cong., 2d Sess. 12 (1976); U.S. Code Cong. & Admin.News 1976, pp. 2572, 2644. Congressman Rodino explained to the House:

> Lengthy delays will give the target firm plenty of time to defeat the offer, by abolishing cumulative voting, arranging a speedy defensive merger, quickly incorporating in a State with an antitakeover statute, or negotiating costly lifetime employment contracts for

> incumbent management. And the longer the waiting period, the more the target's stock may be bid up in the market, making the offer more costly—and less successful. Should this happen, it will mean that shareholders of the target firm will be effectively deprived of the choice that cash tender offers give to them. . . . *Generally, the courts have construed the Williams Act so as to maintain these two options for the target company's shareholders, and the House conferees contemplate that the courts will continue to do so.*

122 Cong.Rec. 10293 (1976) (emphasis added). There is no real dispute that the Idaho statute—like most of the state takeover laws—increases a target company's ability to defeat a tender offer.[46] The Idaho law helps target companies primarily through provisions not found in the Williams Act that give them advance notice of a tender offer[47] and the ability to delay the commencement of an offer, by means such as insisting on a hearing.[48] Most observers of takeover battles agree that time is among the most effective weapons available to a company resisting a tender offer.[49] The Idaho statute favors the target in

[46]*See also* Aranow, Einhorn & Bernstein, *Developments in Tender Offers for Corporate Control* 227-29 (1977); *Federal Securities Code* § 607, comment (2) (Proposed Official Draft 1978); Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Case W.Res.L.Rev. 722, 725 (1970); Sommer, *The Ohio Takeover Act: What is It?*, 21 Case W.Res.L.Rev. 681, 718 (1970); Subcommittee on Proxy Solicitation and Tender Offers, Federal Regulation Securities Committee, American Bar Association, *State Takeover Statute and the Williams Act* reprinted at 32 Bus.L. 187, 193 (1976); Statutory Comment, *Take-Over Bids in Virginia*, 26 Wash. & Lee L.Rev. 323, 329 (1969).

[47]Idaho Code 30-1503(1).

[48]Idaho Code 30-1503(4).

[49]See, e. g., Senate Report at 4; Senate Hearings at 59 (Statement of Prof. Hayes); Aranow & Einhorn, *Tender Offers for Corporate Control* 223 (1973); Austin & Fishman, *Corporation in Conflict:*

other ways, as well. Idaho's regulation of defensive efforts by a target is significantly weaker than Idaho's regulation of an offeror's activities. *Compare* Idaho Code §§ 30-1504 and 30-1505, *with* Idaho Code 30-1503-06. Finally, the Idaho statute gives the target corporation board the power to exclude an offer from state regulation by approving the offer. Idaho Code 30-1501(5)(3).[50]

The district court concluded that these pro-management provisions evidenced a legislative purpose "to inhibit tender offers for the benefit of management". 439 F.Supp. at 437. *Accord,* Moylan, *State Regulation of Tender Offers,* 58 Marq.L.Rev. 687, 690 (1975). The district court further reasoned that this purpose conflicted with the Williams Act's purpose of protecting investors, and that this conflict meant the Williams Act preempted Idaho's statute. 439 F.Supp. at 437.

McEldowney strenuously objects to the district court's characterization of the purpose of the Idaho takeover law. He contends that Idaho, like Congress, legislated to protect investors. He explains the pro-management provisions not as an attempt to prevent tender offers, but as a means of involving the directors and officers of the target in the evaluation of a tender offer. With the advance warning

The Tender Offer 127 (1970); Langevoort, *State Tender-Offer Legislation: Interests, Effects, And Political Competency,* 62 Cornell L.Q. 213, 238 (1977); Wachtell, *Special Tender Offer Litigation Tactics,* 32 Bus.L. 1433, 1437-42; Wilner & Landy, *The Tender Trap: State Takeover Laws and Their Constitutionality,* 45 Fordham L. Rev. 1, 9 (1976).

[50]Among the restrictions imposed on target management by the federal law are Rule 13e-1, 17 C.F.R. § 240.13e-1 (1977), limiting the ability of a target corporation to repurchase its own shares during a tender offer, and Rule 14d-4, C.F.R. § 240.14d-4 (1977) imposing disclosure requirements on incumbent managers who wish to recommend that shareholders accept or reject a tender offer.

and additional time provided by the state law, so he argues, target directors have an opportunity to fulfill their fiduciary duties to shareholders by studying the offer and either negotiating better terms or making a recommendation based on the shareholders' interests. Appellant's Brief at 39-42. McEldowney also explains that management has the power to exclude an offer from Idaho regulation because presumably management will do so only when it already has had an opportunity to study the offer thoroughly and to negotiate fully a takeover. Appellant's Brief at 41.

We need not probe the minds of Idaho legislators to determine whether the true purpose of the Idaho takeover law was to protect investors or to protect incumbent management. Even if we accept the appellant's interpretation of the legislature's purpose, it is still true that Idaho chose to protect investors differently from the way Congress protected investors. Instead of relying upon *investors'* decisions after full disclosure, Idaho relies upon the business judgment of corporate directors with a fiduciary duty to their shareholders. Idaho's "fiduciary approach" to investor protection may be one way to protect shareholders, but it is an approach Congress rejected.[51]

[51]The appellant explains this rejection in part because there are no federal fiduciary standards for corporate directors and officers. Appellant's Brief at 39-40. *See also Santa Fe Indus., Inc. v. Green*, 1977, 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d 480. This explanation is unsatisfactory. Congress could have relied upon state created fiduciary duties. Indeed, in this case Idaho would be relying upon fiduciary duties not created by her law, but by the law of the State of Washington.

In general, a state legislature may be entitled to assume that the directors and officials of a target company will honor their fiduciary obligations. It would not be surprising, however, if another legislative body declined to make the same assumption. To establish a claim under state law, a shareholder usually must overcome a presumption that directors act properly, and prove that they acted in self interest. Few plaintiffs have successfully met this burden. *See, e. g., Cheff v. Mathes*, Del., 1964, 41 Del.Ch. 494, 199 A.2d 548; *Kors v. Carey*, Del., 1960, 39 Del.Ch. 47, 158 A.2d 295. *See also* Senate Hearings at 121 (statement of Prof. Kaplan); Israels, *Corporate Purchases of Its Own Shares—Are There New Overtones?*, 50 Cornell L.Q. 620 (1965).

Idaho's statute is preempted, because the market approach to investor protection adopted by Congress and the fiduciary approach adopted by Idaho are incompatible. The Senator for whom the Williams Act is named has written, "[a]dvance notice provisions, and requirements concerning the duration of offers, the pro rata purchases of shares, and the withdrawal rights of shareholders either explicitly conflict with federal provisions on the same subjects or are obstacles to the accomplishment of objectives implicit in the federal statutes". H. Williams, *Introduction to Developments in Tender Offers for Corporate Control* xix (1977). Congress intended for the investor to evaluate a tender offer; Idaho asks the target company management to make that decision on behalf of the shareholders. *See generally* Note, *Commerce Clause Limitations upon State Regulation of Tender Offers*, 47 S.Cal.L.Rev. 1133, 1150 (1974). That Congress rejected provisions very similar to some of those in the Idaho takeover statute does not mean the state law is automatically preempted. *See, e.g., DeCanas v. Bica*, 1976, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43. In this situation, however, Congress rejected those provisions to preserve the neutral regulatory stance that gives each side of a tender offer an equal opportunity to persuade the investor. When Idaho enacted those rejected provisions it hampered an offeror's ability to express and explain its position directly to investors. In doing so, Idaho disrupted the neutrality indispensable for the proper operation of the federal mar-

ket approach to tender offers regulation.[52]. The Idaho takeover statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the Williams Act.[53]

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[52]Changing economic conditions may have disrupted the balance that Congress struck in the Williams Act. But, it is for Congress—not Idaho—to determine if adjustments in the federal balance are necessary, and if so, what adjustments should be made.

[53]We are not persuaded by the appellant's argument that Idaho's takeover statute is analogous to the state laws governing internal corporate matters and fundamental corporate changes such as mergers, that traditionally have co-existed with federal securities regulation. First, the law of Washington governs the internal affairs of Sunshine, so even if this argument had validity it would not justify Idaho's regulation of the Great Western tender offer. *See, e. g.*, Langevoort, 62 Cornell L.Q. at 222-23. *Western Air Lines, Inc. v. Sobieski*, 1961, 191 Cal.App.2d 399, 12 Cal.Rptr. 719, does not strengthen Idaho's position. In *Western Air Lines* the court allowed California to assert some control over the internal affairs of a Delaware corporation. California had an unusually strong interest in the corporation, however, because over fifty percent of its shareholders were California citizens. *See* Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Scope of Full Faith and Credit*, 58 Colum.L.Rev. 1118, 1191-20 (1958). In contrast, only about two percent of Sunshine's shareholders live in Idaho.

Second, a tender offer involves the sale of securities from one shareholder to another, not a change in the corporation itself. The voting rights of shares and the legal relationship between a corporation and its shareholders does not change because of a tender offer. Although a tender offer can be a substitute for a proxy contest, there are important distinctions between the two. In a proxy contest the existing shareholder transfers only his vote; the other aspects of his existing relationship with the corporation remain. A tendering shareholder severs the existing relationship completely. Note, *Commerce Clause Limitations upon State Regulation of Tender Offers*, 47 S. Cal.L.Rev. 1133, 1154 (1974). *See also* Senate Hearings at 118 (statements of Prof. Mundheim and Prof. Kaplan). Statutes regulating the internal affairs of a corporation concern the existing relationship between a corporation and its shareholders. Since at the beginning of a tender offer the offeror may be a potential shareholder only, laws governing the offeror's conduct are not logically based on control of internal corporate affairs. Note, 47 S.Cal.L.Rev. at 1154. *See also* Wilner & Landy, 45 Fordham L.Rev. at 17; Aranow, Einhorn & Berlstein at 230.

The Idaho statute requires substantially more disclosure than the Wiliams Act. *Compare* Idaho Code § 30-1503(2) *with* Schedule 14D-1, 17 CFR 240 HD-100. In that respect, as the SEC points out, it also interferes with federal regulation. *See* SEC amicus brief at 41-42. McEldowney argues that Congress had the express desire to get information to investors. Idaho's more demanding disclosure requirements, he contends, only go further in the same direction, thereby carrying out rather than frustrating the purposes and objectives of Congress.

Superficially Idaho's extensive disclosure requirements appear compatible with a market approach to tender offer investor protection. In reality, in the area of financial disclosure it can be true that "less is more". Disclosure of a mass of irrelevant data can confuse the investor and obscure relevant disclosures. Hearings on S.510 Before Subcommittee on Banking and Commerce, 90th Cong., 1st Sess. at 205 (1967) (Senate Hearings) (statement of Mr. Cohen); *Corporate Takeovers*, Hearings Before the Senate Committee on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 90 (1976) (*Corporate Takeovers*) (statement of Mr. Loomis); Aranow, Einhorn & Berlstein, *Developments in Tender Offers for Corporate Control* 219-20 (1977). Management may also be able to halt an offer because some immaterial information required by excessive disclosure standards is missing or inaccurate. *See* Idaho Code § 30-1503; Aranow, Einhorn & Berlstein at 220. Those excessive requirements would cut off an offeror's opportunity to present the material information that investors need to make their decisions.

In § 13(d) of the Williams Act Congress delegated to the SEC the task of specifying what data is material to an investor considering a tender offer. The SEC has attempted to write disclosure requirements that provide enough material information without producing reports so detailed and complicated that few shareholders would want to read them. *See Corporate Takeovers* at 90 (statement of Mr. Loomis). That judgment is a legislative one. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. at 175, 83 S.Ct. 1210 (White, J., dissenting). Idaho's effort to second guess that judgment cannot stand. *Id.* This is particularly true because Idaho's additions to the federal disclosure requirements reduce the utility of federally required disclosure and produce an obstacle to the accomplishment of the federal objective to enable investors to make an informed choice about a tender offer.

V.

THE VALIDITY OF THE IDAHO TAKEOVER STATUTE UNDER THE COMMERCE CLAUSE

The commerce clause, U.S. Const., art. I, § 8, grants to Congress the power to regulate foreign and interstate commerce. This affirmative grant also imposes limits upon state power to regulate commerce over which Congress has primary responsibility. *See, e. g., The Great Atlantic and Pacific Tea Co. v. Cottrell*, 1976, 424 U.S. 366, 370-71, 96 S.Ct. 923, 47 L.Ed.2d 55. Nevertheless, not every exercise of state power with some impact on interstate commerce is invalid. "Rather, in areas where activities of legitimate local concern overlap with the national interests expressed

by the Commerce Clause—where local and national powers are concurrent—the Court in absence of congressional guidance is called upon to make 'delicate adjustment of the conflicting state and federal claims' ". *Id., quoting H. P. Hood & Sons, Inc. v. DuMond*, 1949, 336 U.S. 525, 553, 69 S.Ct. 657, 93 L.Ed. 865 (Black, J., dissenting).

A. Congressional Permission

McEldowney contends that no adjustment of state and federal claims is necessary here because Congress consented in the 1934 Act to state takeover laws that might otherwise contravene the commerce clause. Congress has the power to give such consent and thereby to waive usual commerce clause restrictions. *E. g., Southern Pacific Co. v. Arizona*, 1944, 325 U.S. 761, 769, 65 S.Ct. 1515, 89 L.Ed. 1915. *See generally* P. Brest, *Processes of Constitutional Decisionmaking* 219-22 (1975); G. Gunther, *Cases and Materials on Constitutional Law* 367-71 (9th ed. 1975). To determine whether Congress has consented to state regulation of tender offers that interferes with interstate commerce we must examine again § 28 of the 1934 Act, 15 U.S.C. § 78bb (1970). This is the provision that the appellant reads to give such consent.

That examination convinces us that § 28 does not consent to otherwise invalid state laws. When Congress has exempted state laws from commerce clause restrictions it has used language specifically directing that certain interstate commerce may be regulated as though it were purely local. *See, e. g.*, the Wilson Act of 1890, 26 Stat. 313. Congress has also stated that, in the absence of affirmative Congressional action, courts should impose no barriers on state

regulation. *See* the McCarran-Ferguson Act, 59 Stat. 33, 15 U.S.C. § 1011 *et seq.* The language in § 28 of the 1934 Act is notably different from these acknowledged examples of Congressional consent. Rather than allowing violations of the commerce clause, § 28 appears to direct only that federal securities law should not be interpreted as a wholesale displacement of state securities regulation.

The legislative history of § 28 demonstrates that even if we were to interpret § 28 to remove some commerce clause restrictions, that consent would not be broad enough to settle the commerce clause issue raised by the Idaho takeover law. The jurisdiction preserved in § 28 is that "of state security commissions to regulate transactions *within their own borders.*" H.R.Rep.No.85, 73d Cong., 1st Sess. 10 (1933) (emphasis added). *See also* Langevoort, *State Tender Offer Legislation: Interests, Effects, and Political Competency*, 62 Cornell L.Q. 213, 247 (1977). The Idaho takeover law, in contrast, controls transactions made throughout the world.

B. The Pike Test

Because Congress has not settled the commerce clause issues raised in this case, we must look to the numerous Supreme Court decisions on the commerce clause for guidance. Fortunately, the Court has recently undertaken a restatement and distillation of its cases. *See Dixie Dairy Co. v. City of Chicago*, 7 Cir. 1976, 538 F.2d 1303, 1308. In *Pike v. Bruce Church, Inc.*, 1970, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174, a unanimous Court adopted the following statement of the law:

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443, 4 L.Ed.2d 852, 856, 80 S.Ct. 813, 816 [78 A.L.R.2d 1294]. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local intent involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Accord, Raymond Motor Transportation, Inc. v. Rice, 1978, —— U.S. ——, 98 S.Ct. 787, 792-796, 54 L.Ed.2d 664; *A & P Tea Co. v. Cottrell*, 424 U.S. at 371-72, 96 S.Ct. 923.[54]

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[54] The appellant cites *Brotherhood of Locomotive Firemen v. Chicago, R. I. & P. R. Co.*, 1968, 393 U.S. 129, 89 S.Ct. 323, 21 L.Ed.2d 289, to support an argument that the *Pike* balancing analysis is not applicable to this case. Part of this argument is linked to the appellant's contention that in § 28 Congress consented to the Idaho statute. We have already rejected that contention. The appellant also argues against applying *Pike* because the analysis adopted in *Brotherhood* is more deferential to state law than the analysis enunciated in *Pike*. *Pike*, however, refines *Brotherhood*, not vice versa. *See Dixie Dairy Co. v. City of Chicago*, 7 Cir. 1976, 538 F.2d 1303, 1308. Moreover, commentators have pointed out that *Brotherhood* is, at least in part, inconsistent with other recent commerce clause decisions. *E. g.*, G. Gunther at 311. *Brotherhood* may still stand for the proposition that *Pike* balancing is inappropriate when the benefit of state legislation and the burden on interstate commerce are noncomparable. *See American Can Co. v. Oregon Liquor Control Commission*, Or.App. 1973, 517 P.2d 691; *Procter and Gamble Co. v. City of Chicago*, 7 Cir. 1975, 509 F.2d 69. *But see Dixie Dairy Co. v. City of Chicago*, 538 F.2d at 1308 (explaining *Procter and Gamble*). Any such principle is not relevant in this case because both the benefits of the regulation and the burden on commerce are economic.

1. Legitimate local purposes.

The district judge concluded that the immediate purpose of the Idaho takeover law is to protect incumbent management. The district judge further ruled that this purpose is not a legitimate one for state regulation and that no other legitimate local purpose for the Idaho law could be found. McEldowney strongly condemns these findings as a usurpation of the Idaho legislature's functions. We agree with him that at this stage of its analysis the district court too quickly dismissed possible legitimate local interests served by the Idaho takeover law.

It is true that the Idaho law helps incumbent management. One purpose of this favoritism may be to prevent the removal of local business to other states. This purpose would be unacceptable. Indeed, statutes *requiring* business operations to be performed in the home state that could more efficiently be performed elsewhere impose a burden on commerce that is *per se* illegal. *Pike v. Bruce Church, Inc.*, 397 U.S. at 145, 90 S.Ct. 844, 25 L.Ed.2d 174. Idaho's law does not require any business to remain in Idaho; at worst, it hinders relocation. Nevertheless, the purpose of preserving local industry cannot support the legislation. Nor can that effect be ignored.

McEldowney advances a different state interest in helping incumbent management. He points out that a corporation can influence local lifestyle through such means as charitable contributions or civil involvement and the depth of its commitment to issues such as pollution control or job safety. He contends that this interest is benevolent management is a legitimate reason for Idaho to regulate the means by which outsiders can change management. We accept this as a legitimate local interest.

McEldowney argues that the true purpose of the Idaho takeover statute is to protect investors. This is certainly a legitimate purpose. Since we are not concerned at this step of our analysis with the relationship between the legitimate purpose and the means of regulation, we also consider this interest. We note, however, that Idaho has little reason to protect shareholders of other states, if their securities transactions do not take place within that state or substantially affect Idaho shareholders. *See* Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality,* 45 Ford.L.Rev. 1, 17 (1976); Note, *Commerce Clause Limitations upon State Regulation of Tender Offers,* 47 S.Cal.L.Rev. 1133, 1153 (1974). *See also Hall v. Geiger-Jones Co.,* 1917, 242 U.S. 539, 557-58, 37 S.Ct. 217, 61 L.Ed. 480, where the Court turned back a commerce clause challenge to Blue Sky laws in part because the laws regulate only transactions within the state. *Cf. Federal Securities Code* § 1904(c) (Proposed Official Draft 1978) which would preempt state regulation of tender offers unless the target has its principal place of business in the regulatory state and more than 50 percent of the record or beneficial holders of the target's outstanding voting securities holding more than 50 percent of those securities are residents of the regulatory state. In this case, only about two percent of Sunshine's shareholders reside in Idaho. That there are even that many is by chance. Idaho's law would have applied even if no shareholders had resided in Idaho and no securities transactions had taken place within Idaho. Moreover, the business realities of tender offers make it unlikely that there will be many offers for corporations held predominately by Idahoans (or citizens of any other narrow geographic area). Investment bankers

know that local owners are characteristically loyal to management. Therefore, corporations with widespread stock ownership are more promising tender offer targets. *See, e. g.,* Trough, *Characteristics of Target Companies,* 32 Bus. L. 1301, 1301-02 (1977).

2. Impact on interstate commerce.

Rather than establishing interference with commerce that occurred in connection with the Great Western offer for Sunshine, much of the evidence in this case consisted of disputed expert opinions about the general impact Idaho's law would be likely to have on the making of interstate offers and the functioning of national securities markets. One of the effects mentioned at trial is the disruption of the normal securities markets that state-mandated advance notification or announcement of an offer can cause.[55] Another is a change in strategy by offerors. For instance, an offeror anticipating a battle during the delay caused by a state law might deliberately make a low offer so that it can raise its offer to meet that of a competitor. There was also testimony that state statutes such as Idaho's have a general effect of discouraging tender offers. These effects—and others—have been identified by several commentators. *See, e. g.,* Aranow, Einhorn & Berlstein, *Developments in Tender Offers for Corporate Control* 229-30 (1977); Moylan, *State Regulation of Tender*

[55]S. 510 originally included a procedure of confidential advance filings. Both the New York and American Stock Exchanges warned that the inevitable leaks that would result from the preparation of advance filings would disrupt the operation of the securities markets. *See* Senate Hearings at 72-73 (statement of Mr. Calvin), 98 (statement of Mr. Saul).

After hearing from the Exchanges, the Senate committee deleted the advance filing provision.

Offers, 58 Marq.L.Rev. 687, 691-92; Subcommittee on Proxy Solicitations and Tender Offers, Federal Regulation of Securities Committee, American Bar Association, *State Takeover Statutes and the Williams Act* reprinted at 32 Bus.L. 187, 193 (1976); Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality,* 45 Ford.L.Rev. 1, 10-11, 14, 20 (1976); Note, 47 S.Cal.L.Rev. at 1149-52; [1969] Sec.Reg. & L.Rep. (BNA), No. 1 at A11.

To some extent this evidentiary situation was unavoidable. State takeover laws can have numerous effects on a tender offeror's plans. It would be unusual for each of those effects to be felt in a single offer. Nevertheless, we would hesitate to agree with the district court that the evidence shows a substantial effect on interstate commerce if the record contained only speculation about the effect of Idaho's statute and of state takeover laws in general. The record contains more. Baptie's letter of March 21, 1977 delayed an interstate tender offer that would otherwise have gone forward.[56] That action in itself not only had a substantial impact on interstate commerce, it *stopped* over 31 million dollars of interstate commerce. An executive of Great Western testified that after Baptie's letter the company doubted it could ever satisfy Idaho's requirements. Tr. at 156.

In addition, except in the rare tender offer made entirely within Idaho, Idaho's extraterritorial approach to tender

[56]To obtain a preliminary injunction in its Williams Act suit against Great Western, Sunshine first was required to show irreparable injury. *Rondeau v. Mosinee Paper Corp.,* 1975, 422 U.S. 49, 95 S Ct. 2069, 45 L.Ed.2d 12. It failed to do so. *Sunshine Mining Co. v. Great Western United Corp.,* D.Id., 1977, [1977-1978] CCH Fed. Sec.L.Rep. ¶ 96,049.

offer regulation has an inherent impact on interstate commerce. Idaho's law is designed to alter the disclosure made in securities transactions between Idaho and another state, two other states, and even entirely within another state. Idaho's law can also change the time when, if ever, those non-Idaho securities sales will occur. *Cf. Southern Pacific Co. v. Arizona,* 325 U.S. at 773-75, 65 S.Ct. 1515 (state restriction of train lengths that, in practical effect, regulated the length of out-of-state trains).

Finally, Great Western introduced evidence that if New York had also asserted jurisdiction over the Sunshine offer its legal requirements would have contradicted Idaho's. According to George Boswell, Executive Vice-President of Great Western, Great Western was concerned that the advance publication of a tender offer required by Idaho law would violate New York's prohibition of publication. Tr. at 154. Another witness, Jeffrey B. Bartell, testified that it was "conceivable" that the advance publication required by Idaho could constitute an unregistered offering in another state. Tr. at 70. Mr. Bartell gave no specific examples.

This evidence is important because in cases where the rules of different states conflict, the Supreme Court has been severe in its scrutiny of state legislation. L. Tribe, *American Constitutional Law* 339 (1978). Although the potential for such conflict was once enough to trigger such scrutiny, recently the Court has required a showing of actual conflict. *Id.*; G. Gunther at 317-18. The evidence in this case falls somewhere in between. There is evidence that states have already passed contradictory laws, but the evidence is not overwhelming. The sole example of an ac-

tual conflict rests on the plaintiff's own conclusion that a conflict exists between New York and Idaho law. That conclusion, to our knowledge, has never been litigated and may be incorrect.[57] Moreover, since New York ultimately did not assert jurisdiction Great Western was never subjected to conflicting legal requirements. Nor was there evidence of any other offer actually subjected to conflicting state requirements. On the other hand, several commentators have examined the state takeover statutes and expressed a concern that they may be contradictory. *See, e. g.,* Aranow, Einhorn & Berlstein, *Developments in Tender Offers for Corporation Control* 228 (1977); ABA Subcommittee on Proxy Solicitations and Tender Offers, Federal Regulation of Securities Committee, *State Takeover Statutes and the Williams Act* reprinted at 32 Bus.L. 186, 189, 193 (1976); *Corporate Takeovers,* Hearing before the Senate Committee on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 90 (1976) (statement of SEC Chairman Loomis).

The record before us may not warrant the harsh commerce clause scrutiny that follows a demonstration of actual conflict between state rules. The demonstrated concern that state laws may conflict, however, supports other testimony that state statutes such as Idaho's deter tender offers. At any rate, we conclude that evidence other than that concerning conflicting state rules supports the view that the Idaho statute has a substantial impact on interstate commerce for purposes of the *Pike* analysis.

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[57] Great Western apparently inferred a New York prohibition of advance publication from the New York statute's silence on the subject. *See generally* N.Y.Bus.Corp.L., art. 16, §§ 1600-13 (McKinney Supp.1976). An amendment to § 1602 of the New York statute eliminated a requirement that an offeror publish the terms of its proposed takeover bid. N.Y.Bus.Corp.L., art. 16, § 1602 at 69 (McKinney Supp.1976) (note on legislative history).

3. *The balance of the burden and the benefit.*

The final step under *Pike* is to determine whether the legitimate local purposes served by Idaho's takeover statute justify the law's substantial impact on interstate commerce. As with any balancing analysis, we must first determine what degree of judicial examination is appropriate. At one time the Supreme Court assumed a deferential stance in commerce clause cases. *See, e. g., South Carolina State Highway Department v. Barnwell Bros.,* 1938, 303 U.S. 177, 190-91, 58 S.Ct. 510, 82 L.Ed. 734. Since 1938, however, a more intensive inquiry into the reasonableness of state regulation has evolved. *See, e. g., Raymond Motor Transportation, Inc. v. Rice,* —— U.S. at ——, 98 S.Ct. at 794-795; *Bibb v. Navajo Freight Lines, Inc.,* 1959, 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1003; *Southern Pacific Co. v. Arizona,* 1945, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915; G. Gunther at 308-11, 315. The Court has scrutinized the fit between the state's purpose and its regulation. It has also asked whether alternative means of achieving the purpose would impose fewer burdens on interstate commerce, in a manner similar to "least restrictive alternative" analysis. *See, e. g., Pike v. Bruce Church, Inc.,* 397 U.S. at 142, 90 S.Ct. 844.

These more recent cases require greater justification for a law challenged on commerce clause grounds than for one challenged as a violation of due process.[58] G. Gunther at 311. Thus, while we are far from eager to invalidate Idaho's takeover law, we are free to use a stricter standard

[58]One explanation of this heightened scrutiny is that those burdened by state legislation interfering with interstate commerce often had no role in the political process that produced the regulation. *See generally* L. Tribe, *American Constitutional Law* § 6-5 (1978).

than the "rational relationship" test of due process analysis. We are interested in the substantiality of both the local interest itself and the link between the interest and the Idaho takeover law. Finally, we note that the challenged regulations are not examples of the kind of safety regulations the Court has been particularly reluctant to strike down. *See, e. g., Pike v. Bruce Church, Inc.,* 397 U.S. at 143, 90 S.Ct. 844, quoting *Southern Pacific Co. v. Arizona,* 325 U.S. at 796, 65 S.Ct. 1515 (Douglas, J., dissenting).

One state interest to consider is that of protecting investors. The strength of this interest is substantially diluted because Idaho has little reason to protect the large majority of the shareholders affected by the takeover act. In addition, as the district court pointed out, the benefits to investors from the Idaho takeover statute are not certain. 439 F.Supp. at 439. McEldowney asserts that during the state imposed delay of a tender offer, the original offeror may be forced to raise the offer, or another more advantageous competing offer may be made. Nothing in the Idaho statute guarantees those benefits. Indeed, shareholders could be *harmed* by the delay if during the waiting period the offeror reduces the offer or abandons altogether a bid shareholders would want to accept if they had a chance. *See generally,* Langevoort, 62 Cornell L.Q. at 228.

The additional disclosure required by Idaho's statute may assist some shareholders. It may confuse others. Moreover, additional disclosure from the offeror is not likely to be of great use to a shareholder making economic judgments about the desirability of a tender offer. The key relationship is that between the price offered and the value

of the target under current management. *See* Brudney, *A Note on Chilling Tender Solicitations,* 21 Rutgers L.Rev. 609, 616-20 (1967). Incumbent management is more likely to possess information about the current value of the target than is the offeror. Langevoort, 62 Cornell L.Q. at 230.

Another interest asserted by the appellant is that of encouraging civic responsibility by the management of local corporations. No doubt this can be a substantial interest. We question, however, whether it is advanced more than incidentally by the statute challenged in this lawsuit. Surely it cannot be true that all incumbent managers are model corporate citizens or that all tender offerors are vandals. The record certainly contains no support for such a conclusion. Yet, the Idaho takeover statute imposes the same handicaps on all offerors and the same advantages on all incumbent managers.

There is, of course, some relation between the Idaho takeover law and the interest in responsible management. The increased disclosure required by state law might help interested shareholders to determine whether a tender offeror is civically responsible. But that information would be of no help if it is never disclosed because the burdensome state requirements discourage a responsible offeror from ever making an offer for an Idaho corporation. Nor would the state law help if civically irresponsible incumbents are able to force an offeror to abandon his bid by invoking time consuming hearing processes or litigating the adequacy of the immaterial disclosures required by the Idaho statute. Moreover, disclosure will not be an effective means of encouraging corporate civic responsibility if the shareholders concentrate more on the economics of an offer than

the civic attitudes of the offeror. This economic bias seems particularly likely when, as here, most of the shareholders are not Idahoans. *See generally,* Senate Hearings at 157 (statement of Mr. Schanch).

Idaho could encourage good corporate citizenship with legislation more focused on that purpose. Health and safety regulations can be enacted. Tax incentives can encourage charitable contributions. Programs to involve local businessmen in civic problems can be created. These approaches would be likely to have a more direct impact on corporate behavior than increased disclosure in tender offers. They would also impose a substantially smaller burden on interstate commerce than the Idaho takeover law.

Against this uncertain protection for the small percentage of Sunshine shareholders in whom Idaho has a substantial legitimate local interest, and the, at best, indirect and incidental preservation of corporate civic responsibility provided by fuller disclosure, we must weigh our conclusions about the impact of Idaho's takeover statute on interstate commerce. Idaho's extraterritorial regulation of tender offers interferes with securities transactions all over the country. In this case, Idaho's law halted over 31 million dollars of interstate commerce. In addition, Idaho's statute would have compelled a non-Idaho offeror to make burdensome disclosures beyond those required by federal law to Sunshine shareholders all over the world.[59]

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[59]For the reasons already discussed, we have also considered but given less weight to evidence that the Idaho law could interfere with the functioning of the national securities markets, could change the strategy of those contemplating a national tender offer, and could have a general deterrent effect on national tender offers.

We conclude that these burdens are disproportionate to the legitimate benefits the Idaho takeover law provides. This conclusion is strengthened because another effect—perhaps unintended—of the Idaho statute is to hinder the movement of local businesses to other states. As a result, we agree with the district court that the Idaho takeover law is invalid under the commerce clause.

VI.

THE FOURTEENTH AMENDMENT

Great Western's final attack on the Idaho takeover law is that it violates due process because it delegates the legislative power to invoke the state regulatory provisions to private parties—the target's board of directors—without setting sufficient standards for the exercise of that authority. Although this theory is included in Great Western's original complaint, it was not addressed in the district court's opinion and was not pressed during trial.

The anti-delegation doctrine reached its height in *Schechter Poultry Corp. v. United States*, 1935, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570. Since *Schechter* delegations to private parties may have been viewed with some suspicion but *Schechter* has spawned few progeny. *See* K. Davis, *Administrative Law Treatise* § 2.17 (1970 & 1976 Supp.); L. Tribe, *American Constitutional Law* § 5.17 (1978). The delegation of authority in Idaho's takeover law does not contravene what remains of the principle. The fiduciary duties owed by corporate directors to their shareholders provide sufficient standards for the exercise of delegated power. The fiduciary duties imposed on Sunshine's directors came from Washington, rather than

Idaho. Basic fiduciary duties are similar, however, in all the states and the Idaho legislature could legitimately rely upon those duties to guide target corporation directors.

VII.

CONCLUSION

The states have an important role in our system of securities regulation. We do not invalidate Idaho's attempt to supplement the Williams Act without careful consideration of all the arguments raised by the appellant and the amici. Nor are we unmindful that the state experiments with regulation can be as useful in the subject of securities as in other areas. *See New State Ice Co. v. Liebman*, 1932, 285 U.S. 262, 280, 52 S.Ct. 371, 76 L.Ed. 747 (Brandeis, J., dissenting). But, as Justice Brandeis pointed out, such experimentation should be "without risk to the rest of the country." *Id.* at 311, 52 S.Ct. at 387. The Idaho legislature, through its extraterritorial law, made the entire country its laboratory. The takeover statute had extensive, deliberate, and foreseeable effects on transactions having only a minimal connection with Idaho.

The judgment is AFFIRMED.

GODBOLD, Circuit Judge, dissenting in part and concurring in part:

I dissent from the majority's decision because the court lacks power to reach the merits. Though the court has subject-matter jurisdiction under the general jurisdiction statutes, the court lacks personal jurisdiction because service was not proper under the Texas long-arm statute.

As to the special jurisdictional provision of the Securities Exchange Act of 1934, § 27 does not apply to this action.

To facilitate comparison of my views with the majority's, I will follow the structure of the majority's opinion. I wish to stress, however, that the majority analyze jurisdiction and venue under two separate lines of statutory authority. One line is the general jurisdiction and venue statutes, the other the special jurisdictional provision of the Securities Exchange Act. Of course, jurisdiction need be present and venue proper under only one line of authority for the court to reach the merits, but it is necessary to keep the two lines of authority separate.

I. JURISDICTION

A. *Subject-matter jurisdiction under the general statutes.*

I agree that there is subject-matter jurisdiction. There is a federal question, there is diversity, and the amount in controversy exceeds $10,000.[1]

B. *Personal jurisdiction under the Texas long-arm statute.*

The federal rules authorize service "under the circumstances and in the manner" prescribed by the long-arm statute of the state in which the district court sits. Fed.R.Civ.P. 4(e); *see* Fed.R.Civ.P. 4(d)(7). The Texas long-arm statute provides for service on a nonresident natural person doing business in Texas in any action arising out of such business. Tex.Civ.Stat. art. 2031b § 2. "Doing business" is defined to include entering into a contract to be performed in whole or part in Texas or the commission of a tort in whole or part in Texas. *Id.* § 4. Courts have often characterized this statute as an effort by the Texas lawmakers to provide personal jurisdiction to the full extent due process allows. *E. g., Jetco Electronic Industries, Inc. v. Gardiner,* 473 F.2d 1228, 1234 (C.A.5, 1973).

[1] As I read the majority's opinion they do not reach the question whether 28 U.S.C. § 1337 would also confer subject-matter jurisdiction, and of course it is unnecessary to answer that question in this case.

The due process inquiry into personal jurisdiction is centrally concerned with the relationship among the defendant, the forum, and the litigation. *Shaffer v. Heitner,* 433 U.S. 186, 204, 97 S.Ct. 2569, 2580, 53 L.Ed.2d 683, 698 (1977). The interests of the forum state and of the plaintiff in the action's proceeding in that forum should be considered. *Kulko v. Superior Court,* —— U.S. ——, 98 S.Ct. 1690, 56 L.Ed.2d 132, 141 (1978). But due process essentially requires that the defendant have such contacts with the forum state as make it reasonable, in the context of our federal system of government, to require the defendant to defend the particular suit brought here. Whether it is reasonable depends upon the nature and quality of the defendant's activity. *International Shoe Co. v. Washington,* 326 U.S. 310, 319, 66 S.Ct. 154, 90 L.Ed. 95, 104 (1945). The activity must show that the defendant has purposefully availed himself of the benefits and protection of the forum state's laws. *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283, 1298 (1958).

In this case due process would not allow a Texas court to exercise personal jurisdiction over the defendant. First, the defendant has not purposefully availed himself of the benefits and protection of Texas law. Second, the defendant's only contacts with Texas are the effects of its regulation that were felt in Texas, and these effects are of a

different nature and more attenuated quality than will support personal jurisdiction. Third, the State of Texas lacks any interest in this action's proceeding in a Texas forum.

1. Benefits and protection of the forum state's laws.

Due process requires that the defendant have purposefully availed himself of the benefits and protection of Texas law. The majority speculate that this requirement should not be understood literally but assert that in any event the requirement has been met. I believe the requirement means what it says. And the majority's assertion that in any event the requirement has been met lacks substance.

Recent cases affirm the vitality of the requirement that the defendant have purposefully availed himself of the benefits and protection of the forum state's laws.[2] The majority argue the requirement means only that the plaintiff's unilateral activity is insufficient to support personal jurisdiction over the defendant. Certainly the requirement expresses this notion, *see Hanson v. Denckla,* 357 U.S. at 253, 78 S.Ct. at 1239, 2 L.Ed.2d at 1298, but the language of benefits and protection is not surplusage. Rather it

[2]We recently found no personal jurisdiction under the Texas long-arm statute in *Barnstone v. Congregation Am Echad,* 574 F.2d 286, p. 289 (C.A.5, 1978), because "the defendant has neither transacted any purposeful activity within the State of Texas nor has it invoked the benefits and protection of the laws of Texas . . . ." The Supreme Court, when it found no minimum contacts in *Shaffer v. Heitner,* 433 U.S. at 216, 97 S.Ct. at 2587, 53 L.Ed.2d at 705, specifically said the defendants in that case had not availed themselves of the privilege of conducting activities in Delaware in a way that would justify bringing them before a Delaware tribunal. Even more recently the Supreme Court concluded that the defendant in *Kulko* had not purposefully derived any benefit from any activities relating to the State of California which would justify that state's exercise of personal jurisdiction over him.

embodies the idea that it is in part the defendant's enjoyment of the benefits and protection of a state's laws that makes it fair to require the defendant to appear in the state's courts. *See International Shoe Co. v. Washington,* 326 U.S. at 319, 66 S.Ct. at 159, 90 L.Ed. at 103. The Supreme Court has treated the language of benefits and protection as a lateral requirement. For example, in *Kulko* the Court specifically examined whether the defendant had enjoyed the benefits and protection of the forum state's laws and found he had not. —— U.S. ——, 98 S.Ct. at 1698 & n. 7, 56 L.Ed.2d at 132 & n. 7.

The majority say that even if the requirement means what it says it has been met. In part they speculate:

> If Great Western had failed to comply with the Idaho takeover law, and the Idaho officials had obtained criminal sanctions, no doubt the state officials would have expected Texas to honor those criminal judgments.

But Idaho could not obtain criminal judgments without first obtaining personal jurisdiction over the criminal defendants, and once it had personal jurisdiction Idaho could enforce the judgments without Texas having to honor anything. At most Texas's cooperation would be limited to Idaho's seeking extradition of the criminal defendants under the United States Constitution, art. 4, § 2, cl. 2, on the ground they are "fugitives," or under the Uniform Criminal Extradition Act on the ground that, though not fugitives, the defendants are charged with committing an act "intentionally resulting in crime" in Idaho. Tex. Code Crim. Proc. art. 51.13 § 6. Perhaps this provision would apply to the hypothetical prosecution by Idaho. Nevertheless the possibility that sometime in the future a

state may seek extradition of criminal defendants does not cause officials of the putative demanding state to be at the present time purposefully availing themselves of the benefits and protection of the other state's laws.[3]

2. Nature and quality of defendant's contacts.

Due process requires that the nature and quality of defendant's contacts with the forum state be such that it is reasonable to require the defendant to defend that particular suit brought there. Because defendant has conducted no activities in Texas, defendant's only possible contacts are the effects of Idaho's regulation felt by Great Western in Texas. The Supreme Court's recent decision in *Kulko* is instructive. The state court had justified its exercise of jurisdiction over a nonresident defendant in an action for child support by relying on the defendant's having caused an effect in the state. This is similar to the majority's reliance upon the defendant's having caused an effect in Texas. In *Kulko* the Supreme Court concluded that jurisdiction based solely on causing an effect in the state was unreasonable where the cause of action arose from neither

[3]Moreover it seems incorrect to treat this wispy possibility as a jurisdictional factor. I think the majority recognize the insubstantiality of what they call a benefit. They suggest the benefit factor should be discounted when the "benefit" is attenuated and speculative (but without actually discounting the factor in this case). *See* note 28 to majority opinion. It is true the presence of a benefit alone does not satisfy the minimum-contacts test. Other criteria must be met as well. All the same, the "benefit" the majority see suggests that governors, state prosecutors, and state regulatory officials charged with enforcing state laws concerning a multitude of corporate activities are daily subjecting themselves to the reach of civil suits with long-arm service of process.

But cf. Maney v. Ratcliff, 399 F.Supp. 760 (E.D.Wis. 1975) (solicitation of arrest and representation that extradition would be sought held purposeful availing of the benefits of state law in § 1983 civil rights action).

the defendant's causing physical injury in the state nor his commercial transactions in interstate commerce.[4] The effect alone was an insufficient contact. Although *Kulko* itself dealt with a different factual setting, the reasoning in the opinion leads to the conclusion that in this case jurisdiction based solely on causing an effect is also unreasonable. As in *Kulko*, today's case concerns neither tortious conduct nor commercial transactions on the defendant's part.[5] Of course, the defendant's activity, whatever its situs, ultimately impacted on the plaintiff's commercial activity. Idaho's regulation affected Great Western's tender offer. But the due process issue turns on the nature and quality of the defendant's contacts in the forum, not the plaintiff's activity in the forum and elsewhere. Idaho's contacts in Texas have a different nature and a more attenuated quality than support jurisdiction under the minimum-contacts case law.[6]

[4]The Supreme Court recognized that the effects test the state court used was derived from the ALI's Restatement (Second) of Conflict of Laws § 37 (1971), which provides:

> "A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable."

[5]The majority's argument that "Idaho's 'business' is to regulate" confuses a pun with analysis. It is true that a state government may at times engage in commercial activities, but the regulatory activities involved in this case do not present such an instance and cannot be made such by a semantical device.

[6]To support the effects test they use the majority refer to two district court opinions, saying, "Personal jurisdiction has been found to exist over price fixing conspirators whose illegal activities in one state were designed to control prices in the forum state." *Hitt v. Nissan Motor Co.*, 399 F.Supp. 838 (S.D.Fla. 1975), *vacated on other grounds*, 552 F.2d 1088 (C.A.5, 1977), may not even hold what the majority read it to hold. Although the court noted that the

3. The state's interest.

The due process analysis should also consider the interest of the forum state. In this case Texas lacks any interest that would justify the exercise of its jurisdiction. The nature of defendant's conduct points to this problem. The Texas long-arm statute explicitly covers only tortious conduct and commercial transactions, and almost all the Fifth Circuit cases cited by the majority concern either tortious conduct or commercial transactions.[7] The state has a definite interest in tortious conduct because state law deems such conduct wrongful. The state also has an interest in commercial transactions because state law governs the transactions. But the state's interest in other nontortious conduct varies, *see* Restatement (Second) of Conflict of Laws §§ 36-37 (Comments), so it is necessary to find a

defendant "surely must have contemplated that any price-fixing it might have engaged in would have consequences extending into the forums," 399 F.Supp. at 848, the court also analogized price fixing to products liability and placed great weight on the defendant's causing products to be shipped to or sold by wholly owned subsidiaries in the forums. The court suggested that causing products to enter the stream of commerce might have been sufficient. In *Maricopa County v. American Petrofina, Inc.*, 322 F.Supp. 467 (N.D.Cal. 1971), the court said, without much analysis, that the price-fixing conspiracy created a destructive force which caused events and effects in the forum state. In both *Hitt* and *Maricopa* the courts explicitly or implicitly justified jurisdiction by the similarity they perceived between price fixing and tortious conduct. This justification does not extend to today's case: a suit to enjoin the enforcement of state regulation bears little resemblance to a damages action sounding in tort.

[7] *See Wilkerson v. Fortuna Corp.*, 554 F.2d 745 (C.A.5) (commercial tort), *cert. denied*, 434 U.S. 939, 98 S.Ct. 430, 54 L.Ed.2d 299 (1977); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (C.A.5, 1974) (commercial tort); *Jetco Electronic Indus., Inc. v. Gardiner*, 473 F.2d 1228 (C.A.5, 1973) (commercial activity); *Benjamin v. Western Boat Bldg. Corp.*, 472 F.2d 723 (C.A.5, 1973); *Eyerly Aircraft Co. v. Killian*, 414 F.2d 591 (C.A.5, 1969). The only possible exception is *Black v. Acme Markets, Inc.*, 564 F.2d 681 (C.A.5, 1977), an antitrust case.

particular basis in state law for the state's interest in exercising jurisdiction. *Compare Kulko, Part III.* In today's case there is no basis in state law that would give the state an interest in exercising jurisdiction.[8]

4. The majority's effects test.

Additionally I have difficulty with the majority's effects test. This test, as the majority articulate it, could apply broadly to many types of state regulation. I suggest this difficulty points to the inappropriateness of premising personal jurisdiction on the effects caused by state regulation.

The broad possible application of the majority's effects test is evident from an examination of other state regulation of corporate activities, such as qualification to do business, insurance regulation and Blue Sky laws. When a state engages in such regulation, another state will not have judicial jurisdiction over the regulating state's officials merely because the regulation causes, or can be expected to cause, extraterritorial effects. Yet these are examples of state regulations that require sometimes extensive or

[8] Texas may have a general interest in allowing its residents to use Texas courts in actions against nonresidents, but it is a weak interest because as a practical matter Great Western would not be precluded from bringing its action were the Texas courts unavailable. *See Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 498 n. 27 (C.A.5, 1974); *compare McGee v. International Life Insurance Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223, 226 (1957).

Although Supreme Court cases leave no doubt that the factor of the state's interest should be included in the consideration of a state's exercise of judicial jurisdiction, some federal courts considering personal jurisdiction when service is made pursuant to a state's long-arm statute but under the federal rules have overlooked this factor. For example, several decisions have held that Fed.R.Civ.P. 4(e) is available even in cases exclusively within federal question jurisdiction, *see* 4 Wright & Miller, Federal Practice and Procedure: Civil § 1115 at 470 & n.9, even though the state's long-arm statute logically would not apply "under the circumstances" because the state would lack an interest to justify its exercise of jurisdiction.

burdensome compliance and apply to corporations that are often incorporated by other states, headquartered out of state, and owned by nonresidents. There are also abundant examples of state regulations that less directly regulate corporate activities yet have great extraterritorial effects. For example, California's strict requirements for automobile pollution devices have an immense (and foreseeable) impact on auto makers. But GM cannot sue the California regulators in Michigan simply because the California law has its effect there. Similarly, state laws regulating many phases of commerce will often be directed primarily at out-of-state corporations and thus have extraterritorial effects. Food purity laws are one example. Yet the extraterritorial effects are insufficient to support personal jurisdiction over those state officials charged with enforcing the law.

The majority leave unclear what is the exact effects test that they use. They stress that Idaho's regulation foreseeably caused effects in Texas.[9] The effects they specify were Great Western's efforts to comply with the regulation and the restraint of Great Western from its plan. But the majority recede from a test of foreseeably causing effects. They emphasize that "the crucial conclusion . . . is not that the actions of the Idaho defendant under the Idaho takeover law had a 'practical effect' in Texas, but that they

[9]A good exposition of a general effects test is Restatement (Second) Conflict of Laws § 37. Although § 37 as formulated does not contain a foreseeability element, the official caveat notes that a state can seldom exercise judicial jurisdiction over an individual who causes effects in a state by an act done elsewhere when those effects were not foreseeable. Section 37, however, does not support the majority's position, Rather, § 37 notes the constitutional requirement that the nature of the individual's contacts with the state must be such that the exercise of jurisdiction is reasonable, a requirement that is not met in this case.

amounted to the regulation of Great Western's Texas-based business activities."

If this is the majority's test, then the examples I have given above could also be said to amount to the regulation of business activities based out of state. The majority suggest the examples can be distinguished away because of what they term "the concededly unique characteristics of state takeover laws such as Idaho's." They say, "In none of the examples . . . is there a comparable lack of *any* connection between all parties to a transaction, as well as the transaction itself, and the regulating state." To the contrary, Idaho's statute—and state takeover laws such as Idaho's—do indeed have *some* connection, possibly very substantial connection, with what they seek to regulate. First, the state will have a connection with some of the offerees, and not as a fortuity. It is reasonable to expect that many possible target companies covered by state takeover laws are held partially or largely by in-state shareholders. Second, the state has a connection to the transaction itself because the transaction in securities is ultimately one involving the target company's business and properties.

It is difficult to separate the majority's jurisdictional test from a substantive inquiry into the reasonableness of the statute. The only tenable distinction between state takeover laws such as Idaho's and the examples of other state regulations having extraterritorial effects depends entirely on an anticipation of the majority's Commerce Clause holding, namely, that these statutes are invalid under the Commerce Clause. *See* note 37 to the majority opinion.

C. *Subject-matter jurisdiction under the Securities Exchange Act.*

Subject-matter jurisdiction under the Securities Exchange Act requires that a plaintiff's action be brought either to enforce a liability or duty created by the Act or to enjoin a violation of the Act.[10] In this case subject-matter jurisdiction is lacking because plaintiff's action concerns none of these things.

The majority conclude that § 28(a) impliedly prohibits a state official from enforcing a statute that conflicts with the 1934 Act. This is a dubious reading of § 28(a), which simply says,

> . . . Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

15 U.S.C. § 78bb(a) (1970). Section 28(a) immediately follows § 27's grant of exclusive jurisdiction. On its face § 28(a) provides that a state securities commission's jurisdiction is unaffected by the grant of exclusive jurisdiction.[11] The proviso guards against the section's being read too broadly—federal law will still preempt conflicting state law. But this proviso does not impose a liability for the enactment or enforcement of preempted state law, it does not create a duty to refrain from such conduct, and it does not make such conduct a violation of the Act. Certainly it does not do so expressly, and the majority recognize as much.

Section 28(a) also does not impliedly impose a liability, create duty or define a violation, at least not in any sense that § 27 comprehends. Section 28(a), like the sections with which it is grouped, does not effect any positive regulation. It creates neither rights nor remedies. State legislation and regulation can of course be invalidated on Supremacy Clause grounds, but § 27's conferral of subject-matter

[10] Subject-matter jurisdiction and venue under the Securities Exchange Act of 1934 are both controlled by § 27, 15 U.S.C. § 78aa (1970), which provides:

> "The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found."

The reference to criminal proceedings suggests that the violation must be a criminal violation, but I agree with the majority that violation may also refer to a civil violation. Additional support for this conclusion may be found in *Hooper v. Mountain States Securities Corp.*, 282 F.2d 195, 204 (C.A.5, 1960), *cert. denied*, 365 U.S. 814, 81 S.Ct. 695, 5 L.Ed.2d 693 (1961), where we said that a civil action could be maintained under § 27 even "in circumstances where a criminal proceeding would fail."

[11] The Securities Act of 1933, 15 U.S.C. § 77r, the Public Utility Holding Company Act of 1955, 15 U.S.C. § 79u, the Trust Indenture Act of 1939, 15 U.S.C. § 79u, the Trust Indenture Act of 1939, 15 U.S.C. § 77zzz, and the Investment Company Act of 1940, 15 U.S.C. § 80a-49, contain similar provisions. Only the Securities Act of 1933's provision does not include a proviso similar to "insofar as such jurisdiction does not conflict with any provision of this chapter," but it has been so construed. *Travelers Health Assn v. Commonwealth*, 188 Va. 877, 895-897, 51 S.E.2d 263, 271 (Va.1949), *aff'd*, 339 U.S. 643, 70 S.Ct. 927, 94 L.Ed. 1154 (1950).

jurisdiction simply does not encompass Supremacy Clause cases.

The majority point to § 16(b) cases to show that a violation for the purposes of § 27 need not be a criminal violation. I agree that § 27 may include civil violations. *See* note 10 *supra*. The majority's example also provides a useful counterpoint to this case to show what is an implied violation in the sense that § 27 comprehends. As the majority note, the Securities Exchange Act does not directly forbid short-swing trading by insiders. But the Act expressly creates a right in a corporation to recover any profit realized by an insider's short-swing trading in the corporation's stock. 15 U.S.C. § 78p(b) (1970). The implied violation is derived from this positive regulation. The insider's liability is simply the other side of the right created in the corporation by the profit recapture provision.

D. *Personal jurisdiction under § 27.*

Section 27 provides for nationwide service: "[P]rocess in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found."

I agree with the majority that if service were proper under the Texas long-arm statute, personal jurisdiction was of course obtained for the purposes of § 27. But if, as I have concluded,[12] the reach of the long-arm statute does not extend to grasp the defendant in this case, two unresolved questions would have to be reached: First, was the manner

[12]*See* part IB *supra*.

of service proper under the federal rules?[13] Second, was the extradistrict service consistent with due process?[14] Because I conclude that in today's case § 27 does not confer subject-matter jurisdiction,[15] I see no need to answer these controversial questions.

II. VENUE

A. *Venue under § 27.*

Section 27 provides for venue in any district wherein any act or transaction constituting the violation occurred or in the district wherein the defendant is found or is an inhabitant or transacts business.[16] Because the Northern District of Texas is not a district where the defendant is found, is an inhabitant or does business, venue will be proper only if an act or transaction constituting the violation occurred in the district.[17] The majority conclude that the "restraining effect" of Idaho's regulatory activities was a venue-conferring act. This hasty equation of effect with act deserves greater scrutiny.

[13]Because § 27 authorizes nationwide service but does not prescribe the manner of service, Fed.R.Civ.P. 4(e) might be read to allow the Texas long-arm statute to provide the *manner* of service, even though the statute would not provide for service under the same *circumstances*. *See Black v. Acme Markets, Inc.*, 564 F.2d 681 (C.A.5, 1977) (dictum). *But see Hilgeman v. National Insurance Co. of America*, 547 F.2d 298 (C.A.5, 1977).

[14]Although some courts have required minimum contacts with the forum district, arguably the due process concerns raised when a state exercises extraterritorial jurisdiction have no application to a federal court's exercise of extradistrict jurisdiction when a federal statute authorizes nationwide service. *See, e. g., Mariash v. Morrill*, 496 F.2d 1138, 1142-43 (C.A.2, 1974).

[15]*See* part IC *supra*.

[16]Section 27 is quoted in full at note 7 *supra*.

[17]As I have already pointed out, *see* note 7 *supra*. I agree with the majority that the statutory violation need not be a criminal violation, even though § 27 suggests otherwise.

The only case I find which directly supports the theory that an effect may be an act under § 27's language is *Travis v. Anthes Imperial Limited,* 473 F.2d 515, 528-29 (C.A.8, 1973). One claim in that case dealt with conduct occurring in Canada that the court said had a foreseeable effect in the United States. The court first determined that the foreseeable effect was sufficient to make the exercise of jurisdiction reasonable. The court then determined that venue for this claim "lies in the [forum] district because [there] is where the consequences of the Canadian action were felt and where some acts and transactions constituting the violation occurred." Because the court found not only effects but acts and transactions in the forum district,[18] its reference to effects was an unnecessary makeweight. The case is at best weak authority for the majority's theory.

Many cases have held venue proper in situations where the defendant had never physically been in the forum district. Because the possibility of venue under such circumstances is broadly supportive of the majority's conclusion, the cases warrant investigation. In *Hooper v. Mountain States Securities Corp., supra* note 10, we held that defendant's telephone call, which plaintiff received in the forum district, followed by plaintiff's transfer of funds from the same district, made venue proper. Similarly, in *Hilgeman v. National Insurance Co. of America, supra* note 13, we held that venue was proper in the forum district when the defendant sent a premium notice by mail to the district and plaintiff paid by a check drawn in the district. Decisions by

[18]The court situated the acts by relying on the rule, discussed in the next paragraph, that interstate communications occur in both the place of sending and the place of receipt. *See* 473 F.2d at 524 n. 16.

other courts are similar. For example, venue has been held proper in the district where a fraudulent press release was transmitted, *Texas Gulf Sulphur Co. v. Ritter,* 371 F.2d 145 (C.A.10, 1967) (when followed by plaintiff's sale of stock through a broker in the district), and the district where allegedly false proxy material was mailed to a shareholder, *Mayer v. Development Co. of America,* 396 F.Supp. 917 (D.Del.1975).[19] Though these cases at first blush seem helpful to the majority's position, closer examination shows that they do not support a construction of § 27 that reads act to mean effect. All the cases can be confined to the rule they purport to apply—namely, the transmission or reception of any interstate communication supports venue in the forum district. The majority's view of today's case falls outside the rule these cases have applied. The effect felt because of regulatory activities is entirely different from the reception of an interstate transmission.

Another case finding venue proper when the defendant had never physically been in the forum district involved a failure to timely file a report required by federal law. *Investors Funding Corp. of New York v. Jones,* 161 U.S.App. D.C. 420, 495 F.2d 1000 (1974). The court, relying on analogous cases outside securities law, held that venue was properly laid in the district where the report was required to be filed. The rationale developed by the court was closely

[19]*See Sarratt v. Walker,* 405 F.Supp. 132 (D.S.C.1972) (mailing financial statement and solicitation); *Stern v. Gobeloff,* 332 F.Supp. 909 (D.Md.1971) (telephone solicitation); *Oxford First Corp. v. PNC Liquidating Corp.,* 372 F.Supp. 191 (E.D.Pa. 1974) (transmission of false information); *Prettner v. Aston,* 339 F.Supp. 273 (D.Del.1972) (solicitation of proxies by mail); *Schneider v. Sears,* 265 F.Supp. 257 (S.D.N.Y. 1967) (dissemination of allegedly false financial reports).

tied to the mechanics of filing, so this case also offers no effective support for the majority's theory.

In sum, though venue under § 27 has in some circumstances been held proper even when the defendant had never physically been in the forum district, the cases construing § 27 do not support the majority's approach of regarding conduct elsewhere as occurring where it has an effect.

The majority alternatively note that "Idaho officials sent at least one interstate letter into Texas as part of their regulatory efforts." The letter was signed by Melvin Baptie, Deputy Administrator-Securities of the State of Idaho's Department of Finance and an assistant of defendant McEldowney, Director of the Department of Finance. The letter was a nontrivial part of Idaho's enforcement of its statute. Thus, if § 27 were to confer subject-matter jurisdiction, I would agree that venue is proper under the rule we have followed in *Hooper* and *Hilgeman*.

B. *Venue under the general venue statute.*

The applicable general venue statute, 28 U.S.C. § 1391(b), provides that venue is proper "only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law." I agree with the majority that the claim arose in the Northern District of Texas.

The provision for venue where the claim arose serves two possible purposes. The provision ensures that in multiple-defendant actions venue will always be proper in at least one district. *See Brunette Machine Works, Ltd. v.*

Kockum Industries, Inc., 406 U.S. 706, 710 n. 8, 92 S.Ct. 1936, 1939, 32 L.Ed.2d 428, 431 n. 8 (1972). Also the provision will sometimes provide a forum that is more convenient for litigants and witnesses. *See* 1966 U.S.Code Cong. & Admin. News p. 3694.

The place where the claim arose need not be the same as the place of the defendant's conduct. The venue provision replaced an earlier provision allowing a civil action for many automobile-related tort claims to be brought where "the act or omission complained of occurred." 28 U.S.C. § 1391(f) (repealed 1966). The new provision's different language evidences a congressional understanding that the place where the claim arose may be different than the place of the conduct.

There is room for disagreement whether it is better to apply a place-of-injury test, such as courts have tended to use with tort claims[20] and the majority apparently use in today's case,[21] or a weight-of-the-contacts test, such as

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[20] *E. g., McCrory Corp. v. Cloth World, Inc.*, 378 F.Supp. 322, 325 (S.D.N.Y.1974); *Chance v. E. I. DuPont de Nemours & Co., Inc.*, 371 F.Supp. 439, 450 (E.D.N.Y.1974); *see Walker v. Kawasaki Motors Corp.*, 62 F.R.D. 607, 611 (E.D.Tenn.1973).

[21] The majority say:

> "The core of Great Western's claim is that the Idaho officials invalidly prevented Great Western from initiating a tender offer for Sunshine. The offer was initiated in Dallas, Texas. If there is a single place where the allegedly invalid restraint . . . occurred, that place is Dallas."

See also majority opinion at note 31. I interpret the majority's position to be that the claim arose where the effects were felt.

The concept of effects—that is, the effects of Idaho's regulation—is critical to nearly every step of the majority's analysis. They find personal jurisdiction under the Texas long-arm statute because of foreseeable effects on business activities in Texas. They find venue under § 27 because they regard the restraining effect of Idaho's regulation as an act in Texas. And they find venue under § 1391(b)

courts have preferred in more complex cases.[22] Because the alleged injury was felt in several places—both by the offeror and the many offerees—the place-of-injury test is inexact. I would prefer the weight-of-the-contacts test, but either test, when applied in light of the statutory purposes

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because they view the restraining effect as giving rise to the claim. It may be helpful to sort out the differences among these various effects tests. The personal jurisdiction effects test of course has an element of foreseeability and is limited to the regulation of business in Texas. The other effects tests lack similar qualifications. The § 1391(b) effects test requires Texas to be where the effects were primarily felt, because the majority follow the orthodox position that a claim arises in only one district (despite their criticism of this position). For the personal jurisdiction effects test and the § 27 effects test, it matters not whether the effects were primarily in Texas or the Northern District of Texas. It is enough that some effects were felt there.

[22]Antitrust cases applying this test include *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 291 F.Supp. 252, 260-61 (E.D.Pa. 1968); *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 309 F.Supp. 1053, 1056 (E.D.Pa.1969); *Ghazoul v. International Management Services, Inc.*, 398 F.Supp. 307, 314-15 (S.D.N.Y.1975); *U. S. Dental Inst. v. American Ass'n of Orthodontists*, 396 F.Supp. 565, 574 (N.D. Ill.1975); *Redmond v. Atlantic Coast Football League*, 359 F.Supp. 666, 669-70 (S.D.Ind.1973); *Fox-Keller, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 338 F.Supp. 812, 815-16 (E.D.Pa.1972); *California Clippers, Inc. v. U. S. Soccer Football Ass'n*, 314 F.Supp. 1057, 1062-63 (N.D.Cal.1970); *ABC Great States, Inc. v. Globe Ticket Co.*, 310 F.Supp. 739, 742-43 (N.D.Ill.1970); *Goggi Corp. v. Outboard Marine Corp.*, 422 F.Supp. 361 (S.D.N.Y.1976); *Grappone, Inc. v. Subaru of America, Inc.*, 403 F.Supp. 123 (D.N.H.1975). *But see Albert Levine Assocs. v. Bertoni & Cotti*, 314 F.Supp. 169, 170-71 (S.D.N.Y.1970) (place of injury). Cases in other fields applying the test include *B. J. McAdams, Inc. v. Boggs*, 426 F.Supp. 1091, 1103 (E.D.Pa.1977) (breach of fiduciary duty); *Kipperman v. McCone*, 422 F.Supp. 860 (N.D.Cal.1976) (violation of constitutional right); *Honda Assocs., Inc. v. Nozawa Trading, Inc.*, 374 F.Supp. 886, 891-92 (S.D.N.Y.1974) (trademark infringement); *British-American Ins. Co. Ltd. v. Lee*, 403 F.Supp. 31 (D.Del.1975) (securities law); *Weil v. New York State Dept. of Transp.*, 400 F.Supp. 1364, 1365 (S.D.N.Y.1975) (civil rights); *Idaho Potato Comm'n v. Washington Potato Comm'n*, 410 F.Supp. 171, 175-76 (D.Idaho 1976) (trademark infringement and unfair competition). *But see Iranian Shipping Lines, S.A. v. Moraites*, 377 F.Supp. 644, 648 (S.D.N.Y.1974) (Securities case using place-of-injury test).

of facilitating multiple-defendant suits and promoting litigational convenience, establishes that venue was proper in the Northern District of Texas.

III. MERITS

Should jurisdiction exist and venue be proper, I would agree with the majority that Idaho's takeover statute is preempted by federal law. Although the Williams Act does not expressly preempt state law, the Act regulates tender offers through a policy of deliberate neutrality among takeover contestants. The Idaho statute increases the target company's ability to resist an undesired takeover and thus upsets the careful balance struck by Congress. I would agree also that the statute is invalid under the Commerce Clause because the burden on interstate commerce exceeds the legitimate local interest served by the statute.[23]

IV.

Whether the Williams Act preempts state law and whether state takeover statutes may be invalid under the Commerce Clause are important national issues not pre-

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[23]To touch the rest of the bases, I agree with the majority that the issues presented by this case are not moot. And at first glance I would agree that *Ex parte Young* does not preclude the suit's being brought outside Idaho. That landmark decision established simply that a state officer can be sued to enjoin his enforcement of state law and did not speak at all to the forum in which he can be sued. Indeed, the opinion suggests that the officer can be sued in any court "having jurisdiction, Federal or state," 209 U.S. at 165, 28 S.Ct. 441, 456, 52 L.Ed. at 731, and the logic of the opinion implies as much. On closer examination the problem is less simple. The majority premise jurisdiction in the federal district court on their conclusion that the action could have been brought in a Texas state court. The possibility of one state court passing judgment on another state's laws may reach the boundary where the doctrine of *Ex parte Young* is overshadowed by the policies of the Eleventh Amendment.

viously decided by a court of appeals. But the sweep of federal jurisdiction and venue are also important, in the long haul perhaps more important. Jurisdiction and venue in the Northern District of Texas have been dubious, and fought over, in this case from the beginning. These threshold issues should not be submerged in this court in a rush to the merits, by the confecting of new and strained theories of jurisdiction and venue that will create new and vexing national and state problems and diminish the strength of the merits decision. I respectfully dissent.

Civ. A. No. CA-3-77-0405-D.

United States District Court,
N. D. Texas,
Dallas Division.

Sept. 2, 1977.

Great Western United Corporation,
Plaintiff,

v.

Wayne L. Kidwell, Attorney General of Idaho, Tom D. McEldowney, Director of the Idaho Department of Finance, Louis J. Lefkowitz, Attorney General of New York, Francis B. Burch, Attorney General of Maryland, and Norman Polovoy, Commissioner of Securities, Maryland Division of Securities,
Defendants.

MEMORANDUM OPINION

ROBERT M. HILL, District Judge.

In this case plaintiff challenges the constitutionality of the statutes of the states of Idaho, New York and Maryland which seek to regulate tender offers when the subject of the tender (called the target company) has one of various nexus with the states. These are commonly called "takeover" statutes. Plaintiff contends the takeover statutes are preempted by the Williams Act, the federal statute which controls tender offers, and are also violative of the Com-

merce Clause of the United States Constitution. For the reasons set forth below, the court does not reach the merits of plaintiff's case against New York and Maryland, but finds that the takeover statute of the State of Idaho is preempted and violates the Constitution.

I. Facts

Great Western's United Corporation (Great Western) is a publicly owned Delaware corporation with its principal executive offices located in Dallas, Texas. The principal officers, all directors, and the controlling shareholders of Great Western—W. Herbert Hunt and Nelson Bunker Hunt—reside in Dallas. Great Western's stock is listed on the New York Stock Exchange and the Pacific Stock Exchange.

Sunshine Mining Company (Sunshine) is a publicly owned corporation organized under the laws of the State of Washington. The corporate headquarters, employing about fifteen people in corporate functions, is located in Idaho. Sunshine also owns mining and milling operations in Idaho which constitute over fifty percent of its corporate assets. Sunshine wholly owns its subsidiary, Anchor Post Products, Inc., of Delaware (Anchor Post), which in turn owns subsidiaries incorporated in Florida, Texas,[1] Arkansas and California. Anchor Post's manufacturing facilities are based in Maryland. Sunshine further has significant business activities in New York which make application of the New York takeover law arguable. Sunshine's shareholders are fairly well distributed across the United States.[2] At least 489 individual shareholders of Sunshine reside in

[1]Property in Texas includes a manufacturing plant and a warehouse.

[2]Plaintiff's Exhibit M 1.

Texas, and this figure does not include those shares held in street name.

Hecla Mining Company (Hecla) and Silver Dollar Mining Company (Silver Dollar) have non-operating interests in the Sunshine mine in Idaho. In December, 1976, Hecla and Silver Dollar underwrote a proxy fight to oust the present management of Sunshine. In February, 1977, Great Western representatives met with Hecla and Silver Dollar to discuss Great Western's interest in purchasing shares of Sunshine. On March 18, 1977, Great Western announced its agreement to purchase a total of 335,070 shares of Sunshine from Hecla and Silver Dollar. This purchase represents about 6% of Sunshine's outstanding shares. Great Western also agreed that if it were successful in gaining control of Sunshine, it would reimburse Hecla and Silver Dollar for their proxy fight expenses up to $200,000.

On March 21, 1977, Great Western filed a Schedule 13D Statement with the Securities and Exchange Commission pursuant to the Williams Act Amendments to the Securities Exchange Act of 1934, 15 U.S.C. § 78m(b)-(e), 78m (d)-(f)(1970). This same day Great Western publicly announced its intention to make a tender offer for 2,000,000 additional shares of Sunshine (approximately 35% of Sunshine's outstanding shares) at $15.75 per share.[3]

Also on March 21, Great Western contacted through its attorneys the three states whose state officials are named defendants in this lawsuit: Idaho, New York and Maryland.

[3]This was Great Western's "unfriendly" offer. The Sunshine board of directors had the day before refused, under the time constraints placed upon it, to recommend to the shareholders Great Western's "friendly offer," a tender offer at $16.75 per share.

Great Western had evidently concluded that Idaho would certainly assert jurisdiction under its state takeover law but that New York and Maryland might be persuaded not to do so. It accordingly filed an application for registration under the Idaho takeover law and tried to draw indications from the Attorney General of New York and Commissioner of Securities of Maryland that they would not assert jurisdiction.

On March 25, 1977, Great Western received a telecopied letter from the Deputy Administrator of Securities of the Idaho Department of Finance, Melvin J. Baptie, indicating that he found Great Western's disclosures inadequate and that the twenty day time period for a hearing, provided by the Idaho takeover statute, Idaho Code § 30-1503(5), would not start to run until a complete statement was received, completeness to be determined by the Idaho Department of Finance.[4] Tom McEldowney, the Idaho Director of Finance, simultaneously entered an administrative order delaying the date of Great Western's tender offer.

In New York and Maryland, Great Western was faring little better. Great Western's counsel in New York were advised by the office of the Attorney General that New York was "leaning" toward asserting jurisdiction over the tender offer under its takeover law. In Maryland, counsel for

[4]Although Baptie's demands for information considerably exceeded his earlier indications to Great Western that the Schedule 13D information would more or less suffice, there is absolutely no reason to imply any bad faith on Bapties part. This case presented the first filing under the Idaho takeover law, TRO tr. at 24, and some inconsistency and scrupulousness in administering the statute were predictable. The court specifically finds that Baptie did not write the letter of comment with assistance from or solicitude for Sunshine. Great Western never called Baptie back after receipt of the letter to see if any of his comments were negotiable.

Great Western were informed that Maryland would not comment on the applicability of its takeover laws without a hearing.

On March 28, 1977, because of uncertainty as to when, if ever, the tender offer might go forward, Great Western filed this suit in the Northern District of Texas, Dallas Division, for declaratory and injunctive relief against the state officials of Idaho, New York and Maryland from enforcing the takeover laws of their respective states. Great Western urges in its suit that the state takeover laws violate the Commerce Clause of the United States Constitution and are preempted by the Williams Act.

Besides denying liability on the merits, defendants raised a panoply of defenses in avoidance of Great Western's suit. In their answer, they contended that Great Western lacked standing to bring this action, that the court lacked subject matter jurisdiction and personal jurisdiction over the defendants, that defendants are immune from suit under the doctrine of sovereign immunity, that venue is improper in this district and that service of process is insufficient.

On April 8, 1977, the court held a hearing on jurisdiction and venue. On April 21, 1977, the court entered unpublished findings of fact and conclusions of law holding that Maryland should be dismissed because Great Western had no dispute with Maryland and therefore lacked standing to sue the State. The court also held that jurisdiction and venue existed against the States of Idaho and New York under the Securities Exchange Act of 1934, 15 U.S.C. § 78aa.

Thereafter, the State of New York attempted to take an uncertified appeal to the United States Court of Appeals for

the Fifth Circuit which was dismissed on May 16, 1977. On May 23, 1977, a bench trial was held on the merits against New York and Idaho.

The court is of the opinion that Great Western's suit against the State of New York should be dismissed for mootness because New York no longer seeks to enforce its takeover statute against Great Western. The court is further of the opinion that jurisdiction, venue and service are proper against the State of Idaho and that the Idaho takeover statute violates the Commerce Clause, is preempted by the Williams Act and should be enjoined from enforcement. The court's rationale on the issues raised at the jurisdiction and venue hearing and at the merits hearing follows.

II. Standing

The defendants first argue that Great Western lacks standing to bring this suit against them. For the reasons set forth below, the court concludes that Great Western lacks standing against the State of Maryland but has standing against the States of Idaho and New York.

The concept of standing is based on the Article III requirement of the United States Constitution that restricts federal judicial power to "case and controversies." Through case law, standing has evolved into a rule of judicial self-restraint. *Barrows v. Jackson,* 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953).

As articulated by the United States Supreme Court, Great Western must meet two standing requirements. First, Great Western must prove an injury in fact, a concrete interest in the outcome of the suit, sufficient to render the

matter a case or controversy subject to a federal court's Article III jurisdiction. Second, Great Western must be a proper proponent of the legal rights it seeks to enforce and within the "zone of interest" sought to be protected. *Singelton v. Wulff,* 428 U.S. 106, 112, 96 S.Ct. 2868, 2873, 49 L.Ed.2d 826, 832 (1976); *Data Processing Service Organizations v. Camp,* 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed. 2d 184 (1970). These will be discussed in reverse order.

A. *The "Zone of Interest" Test.*

In order to meet standing requirements, Great Western must first show that the interest sought to be protected by the complainants is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *Data Processing Service Organizations v. Camp, supra.* The court is of the opinion that tender offerors are within the zone of interests protected by the Williams Act and that *Piper v. Chris-Craft Industries,* 430 U.S. 1, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977), does not compel a contrary result.

There is no question that the raison d'etre of the Williams Act is protection of shareholders. See *Piper v. Chris-Craft,* 430 U.S. at 26-29, 97 S.Ct. at 942-943, 51 L.Ed.2d at 144-145. But in implementing this policy, Congress placed special emphasis on even-handedness in the treatment of the target's management and the tender offeror. *Id.* at 29-33, 97 S.Ct. at 943-5, 51 L.Ed.2d at 146-7. Senator Williams himself stated:

> This measure is not aimed at obstructing legitimate takeover bids. In some instances, a change in management will prove a welcome boon for shareholder and employee, and in a few severe situations it may be necessary if the company is to survive.

> I have taken extreme care with this legislation to balance the scales equally to protect the corporation, management, and shareholders without unduly impeding cash takeover bids. Every effort has been made to avoid tipping the balance of regulatory burden in favor of management or in favor of the offeror.
> 113 Cong.Rec. 854 (1967)

This Congressional policy of even-handedness between management and offeror is sufficient to satisfy the zone of interest test of *Data Processing*.

Furthermore, while the Williams Act was created to protect shareholders from unscrupulous tender offerors, the legislation attempts to harness the tender offer as a pugilistic device for maximally advancing the interests of the shareholders. If Congress intended to encourage management and offerors to thrash it out for the benefit of the shareholders, it would be strange to deny the combatants any implicit interest in the procedures to be followed.

Although *Piper v. Chris-Craft* contains some broad statements to the effect that tender offerors were not intended beneficiaries of the Williams Act, the Court was at all times speaking in regard to interests in monetary damages under the Williams Act. The court ultimately concluded that implying a cause of action under the Williams Act for damages on behalf of the tender offeror would injure the very class for which the legislation was enacted. Damages against the target are damages against the shareholders. The Court specifically withheld judgment on the tender offeror's standing to sue for relief other than damages. 430 U.S. at 430-432, 97 S.Ct. at 949, 51 L.Ed.2d at 153 n. 28. This court is therefore free to hold that the Con-

gressional policy of even-handedness is probative of its intent to grant standing to tender offerors and target management for declaratory and injunctive relief under the Williams Act. Great Western is within the zone of interest sought to be protected by the rights it asserts.

B. *The "Injury in Fact" Test*

Great Western must also meet the second standing requirement by showing that it has a sufficient interest in the case for its dispute to qualify as a case or controversy. Put another way, Great Western must show that it actually suffers an injury due to defendants' acts challenged in this suit.

Great Western pled in its complaint that the various takeover statutes have a "chilling effect" upon the rights of tender offerors throughout the country. Yet the mere existence of defendants' takeover laws does not lend the degree of concreteness constitutionally required of a case or controversy. It is incumbent upon Great Western to show indication of the intentions of Idaho, New York and Maryland to enforce these statutes to its detriment.[5] Through overtures to the three defendants before the institution of

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[5] *See, e. g. California v. LaRue*, 409 U.S. 109, 112, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972) (the litigants stipulated that the California Department of Alcoholic Beverage Control intended to take disciplinary action against appellee liquor licensees who offer sexual live entertainment in violation of state rules). The injury to one seeking a declaratory judgment against an allegedly unconstitutional state statute need not necessarily stem from the threat of immediate enforcement or prosecution; a threat of future enforcement by the state may be sufficient if the state is coercing some present compliance under the statute. *Lake Carriers' Association v. MacMillan*, 406 U.S. 498, 92 S.Ct. 1749, 32 L.Ed.2d 257 (1972) (Michigan did not threaten immediate enforcement of challenged water pollution statute but was forcing plaintiffs to build sewerage storage facilities by threat of future enforcement.)

this suit, Great Western evoked the threat of enforcement with varying degrees of success.

1. *Standing as to Idaho*

There is no question that a case or controversy exists vis-a-vis Idaho officials. Baptie's detailed letter of comment, pointing up many shortcomings of Great Western's application under the Idaho law, and McEldowney's order, asserting jurisdiction over the proposed tender offer under the Idaho law and enjoining the tender offer from proceeding, constitute clear acts of present enforcement of the challenged law. Idaho officials have coerced compliance with their state takeover act. Great Western has produced testimony of John S. Guest, an investment banker, that delays under all of these state acts inflict an economic cost on the tender offeror by tying up his capital and significantly jeopardize the success of an offer. Under these facts, in the case of Idaho, Great Western has shown a sufficiently concrete injury stemming from the enforcement of an allegedly unconstitutional state law.

2. *Standing as to New York*

The actions of the New York officials are more problematical. The court heard testimony at the hearing on jurisdiction and venue from Milton Strom, whose firm has represented Great Western in New York, and William S. Dugan, an attorney with the New York Attorney General's office. The court has additionally inspected the affidavit of Martin S. Weber, also with the New York Attorney General. The witnesses generally agreed that Strom's firm and in particular Robert Pririe, a member of the firm, initiated

contact with the New York Attorney General's office during the week of March 21, 1977, in regard to the proposed tender offer. Strom's firm submitted a memorandum and attempted to secure a ruling from the Attorney General that New York would not assert jurisdiction (over the proposed tender offer) under its takeover law.

On March 23, 1977, Dugan told Pririe that "we were leaning towards a finding of jurisdiction." Transcript of April 8, 1977, (hereafter Tr. 1) at 158. On March 24, 1977, Weber conversed with Strom. Weber's affidavit relates the content of his communication to Strom in the exact same terms: they "were leaning toward finding jurisdiction," although they were still investigating. Mr. Strom testified that "Weber said that his office either, I don't remember his exact language, but it had either concluded or believed there was jurisdiction . . ." Tr. 1 at 23. Dugan testified that as of the date of the April 8, 1977, hearing no official decision had been made by the New York Attorney General to assert jurisdiction. Tr. 1 at 167. Such an official decision would be implemented by seeking a court order enjoining the tender offer. Tr. 1 at 171. New York was then proceeding with its investigation. Tr. 1 at 179.

At the time of the first hearing, the court viewed this evidence as presenting a coherent picture: the New York Attorney General has taken a working position that it had jurisdiction over the tender offer, and it was proceeding in lawyerlike fashion to finish its investigation into the relevant facts and law. It seemed a reasonable inference that Great Western would be enjoined by New York if it attempted to go forward with its takeover. N.Y.Bus.Corp. Law § 1606(a) (1976). Moreover, Great Western would

have exposed itself to criminal penalties if its conduct in going forward (after being informed of probable jurisdiction by the New York Attorney General) were deemed willful. N.Y.Bus.Corp.Law § 1607(a).

Under these circumstances, the court did not believe that the threat of action by New York was imaginary or speculative. Its position as to its takeover law was sufficiently adverse to Great Western to constitute a case or controversy,[6] and it was not necessary for Great Western to invite civil or criminal penalties for violating the New York law. *See Steffel v. Thompson,* 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). The court therefore found in its preliminary findings of fact and conclusions of law, entered April 21, 1977, that New York officials had arrived at the working position that they had jurisdiction over the proposed tender offer under the New York takeover law and that a case or controversy existed.

3. *Standing as to Maryland*

With regard to the third defendant, Maryland, the court concluded on April 21, 1977, that no case or controversy ever existed because Maryland's assertion of jurisdiction over this tender offer was purely speculative. Mr. Polovoy, the Maryland Commissioner of Securities, successfully resisted the blandishments of Great Western to take a posi-

[6]While the most convincing demonstration of concrete injury under a regulatory statute is the repetitive enforcement of sanctions, e. g., *Armour v. Ball,* 468 F.2d 76 (6th Cir. 1972), such a requirement in the context of tender offers would effectively remove the declaratory judgment as a remedy. The court views *Lake Carrier's Association v. Michigan, supra,* as indicative that a court may consider economic pressures upon a business, induced by the likelihood of future enforcement of sanctions, in judging the effectiveness in face of a statutory obligation.

tion on Maryland's jurisdiction over the proposed tender offer. He testified in his deposition that he was unable to make a determination of jurisdiction from the facts he presently knew, that he had no intention of calling a hearing to investigate further unless someone asked him to do so, and that no one had asked. Polovoy Deposition at 12-14. Although this indecision by Maryland may have caused Great Western some inconvenience and expense—e. g., the necessity for further research or investigation—the court did not believe that Great Western was realistically prevented from going forward vis-a-vis Maryland, especially since Maryland's enforcement procedures for its takeover statute are exclusively civil. Polovoy Deposition at 6. The court now repeats its conclusion that Maryland has not presently indicated an intention to enforce its statute and that Great Western does not yet suffer an adequate detriment to make a concrete case of controversy against the Maryland statute.

Great Western has proven it has a "case or controversy" with Idaho and New York and has standing to assert claims against these defendants.

III. Mootness

At the hearing of May 23, 1977, after its frustrated attempt to take an uncertified interlocutory appeal in this case, New York representatives introduced in court a no action letter dated May 20, 1977, informing Great Western of the New York Attorney General's determination that the assets of Sunshine were not substantial enough to trigger the New York takeover statute. Although no party to the suit expressed any desire to have the case dismissed against the New York officials, the court raised the issue

of mootness, which affects this court's subject matter jurisdiction. *North Carolina v. Rice,* 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971).

The doctrine of mootness stems from Article III of the United States Constitution which enables courts to adjudicate "cases and controversies." Federal courts lack jurisdiction to decide questions that do not affect the rights of the litigants before them and are not empowered to decide moot or abstract questions. *North Carolina v. Rice,* 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971); *U. S. v. Alaska S.S. Co.,* 253 U.S. 113, 40 S.Ct. 448, 64 L.Ed. 808 (1920).

New York desires to remain in the case to test on appeal its ardently held conviction that its officials may not be subjected to suit in another state on the basis of official actions. But New York's desire to vindicate itself on appeal is not sufficient to preserve a case or controversy.

Great Western has also insisted that the case is not moot as to New York. Although it is apparent that no relief against New York is necessary for Great Western to make its proposed tender offer, Great Western urges that the "voluntary cessation of allegedly illegal conduct does not . . . make the case moot." *United States v. W. T. Grant,* 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953). *Grant,* however, was a *public* challenge to discontinued action. The Court was further satisfied that there existed "some cognizable danger of recurrent violation, something more than the mere possibility which keeps the case alive." *Id.* at 633, 73 S.Ct. at 898, 97 L.Ed. at 1309. As Professor Wright observes, however, a private plaintiff, such as

Great Western, must make a more particularized showing of future impact:

> Private plaintiffs challenging discontinued official or private action, however, must show more than the possibility of recurrence. In addition, there must be shown some level of probability that recurrence will affect the individual plaintiff . . . . Many state courts are willing to decide issues of public interest that are expected to recur, and to pose continuing difficulties of repeated mootness, without regard to the probable impact on the immediate plaintiff. The Supreme Court, however, has explicitly refused to apply this doctrine . . .

Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3533 at 285. As Professor Wright also suggests, this requirement may be diluted when there is a future impact on interests which the plaintiff is in effect given standing to represent, i. e., public interest cases such as abortion and election suits. *Id.* at 289.

While the instant case may involve issues important to many investors and corporations, the court does not believe that it falls into the pattern of public interest cases about which Professor Wright is speaking. Great Western, as a private litigant, has not made the required showing that it will again be injured by enforcement of the New York law. Nor can Great Western accurately characterize the actions of the New York officials as "capable of repetition, yet avoiding review" so as to avoid the requirement of a projected future effect upon itself. It is true that the few hostile tender offerors in recent years affected by these state takeover laws have chosen to comply as a tactical matter. It is generally quicker to comply than to litigate, and time is of the essence in tender offers. However, with

the recent proliferation of state takeover laws,[7] it is reasonable expectation that more companies will come to the conclusion of Great Western that the possible conflicts and confusion of complying with multiple state takeover laws are intolerable. The court has no doubt that the New York law will be challenged in the future under appropriate circumstances. For these reasons, the court lacks jurisdiction to adjudicate the case against New York due to mootness and it should be dismissed.

IV. Subject Matter Jurisdiction

Great Western has sought subject matter jurisdiction on four bases: 28 U.S.C. § 1331 (general federal question), 28 U.S.C. § 1332 (diversity), 28 U.S.C. § 1337 (acts regulating commerce), and 15 U.S.C. §§ 78aa (The Securities Exchange Act of 1934). The parties have stipulated that the amount in controversy exceeds $10,000.

In the opinion of the court, subject matter jurisdiction exists under 28 U.S.C. §§ 1331[8] and 1332. The court is further of the opinion that a suit challenging state legislation as preempted by the Securities Exchange Act of 1934 arises under Acts of Congress regulating commerce. Jurisdiction also lies under 28 U.S.C. § 1337.

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[7] As recently as 1974, only five states had takeover laws: Minnesota, Nevada, Ohio, Virginia and Wisconsin. Today twenty-eight states have such laws.

[8] It has long been held that a suit "arises under" the Constitution if the petitioner's claim "will be sustained if the Constitution . . . [is] given one construction and will be defeated if [it is] given another."

Powell v. McCormack, 395 U.S. 486, 514, 89 S.Ct. 1944, 1960, 23 L.Ed.2d 491 (1969). The instant case turns on construction of Article I, § 8 (the Commerce Clause) and Article VI, cl. 2 (the Supremacy Clause) of the United States Constitution.

The Securities Exchange Act of 1934 § 27, 15 U.S.C. §§ 78aa [hereinafter 1934 Act] grants the federal courts "exclusive jurisdiction of the violations of this title or rules and regulations thereunder and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder."

In the opinion of the court, a suit for declaratory judgment against a statute preempted by the Williams Act, which is codified under the 1934 Act at 15 U.S.C. §§ 78m (b)-(e), 78m(d)-(f), falls within the broad ambit of this jurisdictional language: "all suits in equity or actions at law." The general breadth of the subject matter jurisdiction, personal jurisdiction, and venue conferred by § 27 indicates a Congressional intent to facilitate the litigation of any claim arising under the 1934 Act in federal court. Jurisdiction of a cause of action claiming preemption of a state law by virtue of the 1934 Act is especially appropriate since § 28(a) of the Act, 15 U.S.C. § 78bb(a), specifically addresses preemption of state law.[9] This section creates an express "duty" on states and state officers to abstain from enforcement of state securities laws to the extent they are preempted. Therefore, Great Western has properly alleged subject matter jurisdiction under §§ 1331, 1332, 1337 and 27.

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[9] "Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."

V. Sovereign Immunity

Defendants contend they are immune from suit due to the doctrine of sovereign immunity. Sovereign immunity is based on the old common law concept that a sovereign cannot be sued without its consent. The Eleventh Amendment provides that a state is not suable in a federal court "by citizens of another state." Though hoary, the doctrine is still viable. *Edelman v. Jordan,* 415 U.S. 651, 678, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). However, in *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the United States Supreme Court held that a citizen may sue a state official to enjoin operation of an allegedly unconstitutional state statute, a decision that opened the floodgates to constitutional litigation. Perhaps the Idaho defendant truly considers *Ex parte Young, supra,* "an anomaly in the law." Idaho Brief for Jurisdiction and Venue Hearing at 40. In the opinion of the court, *Ex parte Young* is one of the pillars of our post-Civil War federal system and is firmly ensconced in our jurisprudence. Its application to prospective relief against state officials such as is sought in this case is to date unquestioned. See *Edelman v. Jordan,* 415 U.S. at 664, 667-8, 94 S.Ct. 1347, 39 L.Ed. 662. Sovereign immunity is no bar to a suit seeking declaratory and injunctive relief against state officials to prevent their prospective enforcement of an allegedly unconstitutional state law.

VI. Personal Jurisdiction

The Court has subject matter jurisdiction over this case on four bases: 28 U.S.C. § 1331 (general federal question), 28 U.S.C. § 1332 (diversity), 28 U.S.C. § 1337 (acts affecting commerce) and Section 27 of the 1934 Act. The court must now examine each subject matter cause of action to determine whether personal jurisdiction exists against the State of Idaho.

A. *Diversity Jurisdiction*

In diversity cases brought under 28 U.S.C. § 1332 the federal court sits as a state court and state law of personal jurisdiction controls. *Arrowsmith v. United Press Intl.,* 320 F.2d 219 (2nd Cir. 1963). Texas art. 2031b, Tex.Rev.Civ. Stat., provides for personal jurisdiction over non-residents. The scope of personal jurisdiction exercised by the State of Texas is contiguous with maximum constitutional limits of jurisdiction. *Product Promotions v. Jacques Cousteau,* 495 F.2d 483, 491-2 (5th Cir. 1974); *Hoppenfeld v. Crook,* 498 S.W.2d 52, 56 (Tex.Civ.App.—Austin 1973, writ ref'd, n. r. e.). There are two tests used to determine if jurisdiction exists. In order for a nonresident to be amenable to suit pursuant to art. 2031b there must be, first, "minimum contact with [Texas] which results from an affirmative act of the defendant" and "it must be fair and reasonable to require the defendant to come into the state and defend the action." *Product Promotion v. Jacques Cousteau,* 495 F.2d at 494.

1. *The "Minimum Contacts" Test*

The state of Idaho clearly has "minimum" contacts with Texas. The Idaho takeover statute prohibits Great Western from making *any* tender offer until Idaho law has been complied with. Idaho Code § 30-1501 et seq. This proscription affects Texas shareholders who might wish to sell their shares of stock.

Idaho has urged strongly that almost any state legislative or regulatory action in the commercial sphere effects predictable consequences outside the state and that more contact should be required than this minimum contact. For example, enforcement of Idaho blue sky law, regulating the offer or sale of securities by a Texas corporation in Idaho, would certainly have an impact in Texas. If the corporation were for some reason unable to comply with Idaho blue sky requirements, its inability to raise capital might cause Texas residents to lose their jobs. If the Idaho legislature passed new and onerous pollution controls on facilities owned by a Texas corporation in Idaho, Texas shareholders would be adversely affected. Subjecting state officials to suit in another state on the basis of out-of-state ripple effects from traditional, internal activities would be disruptive of federal relations.

But the court sees a qualitative difference in activities which concern primarily the internal commercial affairs of Idaho and incidentally affect out-of-state interests and the type of affirmative regulation of commercial affairs of non-residents attempted by the takeover act in question, Idaho Code § 30-1506. The court knows of no real analogy to this type of extraterritorial interference.

The Idaho takeover laws are not an exercise of the state's power to regulate the internal affairs of a corporation whose legal existence is derived from state power.[10] Sunshine is a Washington corporation which has triggered

[10]For other arguments that tender offers do not affect existing intracorporate relationships and thus involve the internal affairs of a corporation, See Comment, Commerce Clause Limitations upon State Regulation of Tender Offers, 47 So.Cal.L.Rev. 1133, 1153-7 (1974).

the Idaho takeover law because its principal office is located in Idaho and it has substantial assets in Idaho. Idaho Code § 13-1501(6).

Nor are state takeover laws analogous to state blue sky laws which protect state residents from fraudulent acts committed within state borders. Idaho has not merely told Great Western that it may not make a tender offer within Idaho—it has ordered Great Western to refrain from soliciting publicly traded securities anywhere. Idaho representatives have justified this extraterritorial aspect of the Idaho takeover law as necessary to protect the relative position of Idaho shareholders vis-a-vis shareholders of other states.[11] TRO tr. at 26. It is as if, to expand upon a previous example, Idaho enjoined corporations somehow subject to its jurisdiction from offering securities in any state unless they first complied with Idaho blue sky registration requirements. Idaho of course would not want its citizens deprived of advantageous investment opportunities if such corporation were inclined to omit Idaho from their offerings because of onerous blue sky requirements.

2. *The "Fair and Reasonable" Test*

The second requirement for personal jurisdiction is that it be "fair and reasonable" to require Idaho to defend a suit in Texas.

The court does not consider it fair and reasonable to subject state officials to suit in another jurisdiction because of extraterritorial ripple effects resulting from internal state actions. However, it does not offend this court's sense

[11]If there were no Idaho shareholders of Sunshine, Idaho could still apply its takeover law out of paternal concern for the shareholders of sister states. TR. I at 225.

of fundamental fairness to made Idaho officials defend in whatever forum they attempt to affirmatively regulate commercial affairs of nonresidents, whether this extraterritorial regulation is valid or invalid. Personal jurisdiction exists against officials of the State of Idaho pursuant to art. 2031b insofar as Great Western's diversity cause of action.

B. *Federal Question Jurisdiction*

Sections 1332 and 1337 of Title 28 do not contain any provisions for maintenance of personal jurisdiction. Section 27 of the 1934 Act provides that an action "may be brought" in the district "wherein any act or transaction constituting the violation occurred" or in which "the defendant is found or is an inhabitant or transacts business." This language in Section 27 sounds more like a venue provision rather than one providing personal jurisdiction and has been so construed. *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F.Supp. 191 (E.D.Penn.1974). Thus none of the federal question causes of action contains statutes providing for personal jurisdiction. When suits are brought in federal court on a federally created right without such a provision general federal law and concepts of due process determine whether a defendant is subject to the court's jurisdiction. Wright & Miller, Federal Practice and Procedure: Civil § 1075 (1969).

There is some difference of opinion among jurists and legal writers as to what standards are to be applied to determine if personal jurisdiction exists. Historically, the concept of personal jurisdiction is founded on the antiquated concept of Anglo-American law that a sovereign may exercise personal jurisdiction within its territorial

limits. This principle has been recognized as to the United States itself in suits based on federally created rights. *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F.Supp. 191, 198-200 (E.D.Penn.1974). Some writers have opined that personal jurisdiction exists against defendants anywhere in the United States[12] on a federally created cause of action without the necessity of any demonstration of the "minimum contacts" articulated in *International Shoe v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and its progeny, which set forth limitations on the exercise of extraterritorial jurisdiction by states beyond their territorial limits. In contrast, on federally created causes of action no attempt is made to assert extraterritorial jurisdiction since federal jurisdiction exists in all states. *Stern v. Gobeloff*, 332 F.Supp. 909 (D.Md. 1971); *First Flight Co. v. National Carloading Co.*, 209 F.Supp. 730 (E.D.Tenn.1962).

Most writers, however, have assumed some limits upon federal personal jurisdiction. Some have adopted *International Shoe* criteria, while others have held that the Fifth Amendment due process clause imposes constitutional limits. In *Oxford First Corp. v. PNL* [sic.] *Liquidating Corp.*, 372 F.Supp. at 203 (E.D.Penn.1974), the court applied a five-prong federal "fairness" test, of which one consideration was the *International Shoe* "contacts."[13]

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[12]Safeguards exist other than limits on personal jurisdiction. Once jurisdiction is found venue and service of process provisions must also be met to submit a defendant to jurisdiction in a district.

[13]The court also considered matters which would be considered under 28 U.S.C. § 1404, such as inconvenience to the defendant in the forum, the matter of judicial economy, the site of discovery and the extent of impact of the regulated activity in question that the defendant's actions have beyond its borders.

This court is of the opinion that the Fifth Amendment places some fairness limitations upon the power of the United States to require a defendant found within the territorial limits of the United States to be tried in some areas of the country. However, the court holds that the assertion of personal jurisdiction over the Idaho defendants pursuant to §§ 1331, 1337 and 27 does not impose any undue hardship upon the defendants or violate any fairness constraints on the federal judicial power under the circumstances of this case. These defendants have, to advance the interests of Idaho citizens and/or Sunshine, a corporation with Idaho ties, enjoined Great Western, a Texas based corporation, from purchasing shares of Sunshine from citizens of every state, including at least 489 Texas residents. Idaho officials give their takeover statute this extraterritorial effect by forbidding tender offerors subject to their jurisdiction from making any offer to citizens of antother state which is not also made to citizens of Idaho. Idaho Code § 30-1506.

The court is not impressed with the Idaho defendants' legalistic suggestion that as state officials they can only enforce their takeover laws through personal jurisdiction over Great Western within their territorial borders, that thus they have no presence outside their borders, and that it is therefore unfair to make them defend in Texas. TRO tr. 44, 116. The practical effect of the Idaho defendants' actions is to regulate business activities of Great Western and the investment opportunities of shareholders of Sun-

shine in Texas and every other state.[14] The court does not therefore find it unfair to make the Idaho defendants appear where the predictable consequences of their purposeful actions are felt. Personal jurisdiction exists against the Idaho defendants on the causes of action brought under Sections 1331, 1337 and 27.

VII. Venue

It has been determined that personal jurisdiction exists against the Idaho defendants. The next inquiry is whether venue is proper in this district.

A. *Venue of Federal Question Cases*

Section 1391(b) of Title 28, United States Code, provides that a civil action in which jurisdiction is not founded solely on diversity of citizenship may be brought in the judicial district "where all defendants reside, or in which the claim arose, except as otherwise provided by law." Sections 1331, 1332 and 1337 of Title 28 do not contain venue provisions and causes of action based on these sections may only be brought in the Northern District of Texas if venue lies under one of the two venue provisions contained in § 1391(b).

The Idaho defendants clearly do not "reside" within the Northern District of Texas and venue cannot rest on the

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[14] Although, as Idaho itself suggested at trial on the merits, its extraterritorial regulation may be void, its state officials have previously taken the contrary position. TRO tr. at 116. No prudent businessman is going to make the offer outside of Idaho and await the state's view on whether he should spend up to three years in prison. Idaho Code § 30-1510.

residence of defendants. Nor did the claim arise in this district. A claim is deemed to arise only in one place for § 1391 venue purposes. Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3806 at 28-29 (1976). In determining where a claim arises, courts should use a weight of contacts test and determine the district where the contacts are most significant. *Grappone, Inc. v. Subaru of America, Inc.*, 403 F.Supp. 123 (D.C.N.H.1975); *Ghazoul v. International Management Services, Inc.*, 398 F.Supp. 307 (D.C.N.Y.1975).

It can be argued that the Idaho defendants injured Great Western in the Northern District of Texas, but any such argument applies equally to all other federal judicial districts. It is clear that Great Western's claim arises in Idaho, the source of the power extraterritorially asserted.

Therefore, venue in this district does not lie on Great Western's causes of action based on §§ 1331, 1332 and 1337.

B. *Venue Under the 1934 Act*

Unlike §§ 1331, 1332 and 1337, § 27 of the 1934 Act contains a venue provision and allows an action thereunder to be brought "in any district . . . wherein any act or transaction constituting the violation occurred or in the district wherein the defendant . . . transacts business . . ." The 1934 Act is intended as a broad, remedial statute and the plain intent of Congress was to provide the most potent venue provisions possible.

The acts giving rise to violation of Idaho's alleged preempted takeover statute occur wherever the statute is being enforced, i. e. all states in which Sunshine shareholders reside. If this result seems remarkable it is because Idaho's regulation of securities transactions outside its borders is equally remarkable. By enforcing this statute against Great Western and Texas shareholders of Sunshine, the Idaho defendants have committed acts in Texas which constitute an integral part of their allegedly unconstitutional enforcement of the Idaho takeover law. See *British Amer. Ins. Co., Ltd. v. Lee*, 403 F.Supp. 31, 33-34 (D.Del. 1975). The control exerted by the Idaho defendants in Texas is an economic and legal reality unfettered by any theoretical territorial limits upon Idaho's jurisdiction.

Venue lies in this district against the Idaho defendants on the cause of action based on § 27 of the 1934 Act. Pendent in personam jurisdiction and venue exist to consider Great Western's claim that enforcement of the Idaho takeover statute unconstitutionally burdens commerce. *Oxford First Corp. v. PNL* [sic.] *Liquidating Corp.*, 372 F.Supp. 191, 196 n. 15 (E.D.Penn.1974).

VIII. Service of Process

Rule 4 of the Federal Rules of Civil Procedure governs process in federal courts. Rule 4(d) governs service of process on defendants within the state in which the federal district court is located, while Rule 4(e) governs service on a defendant outside that state. Rule 4(e) provides the only means of accomplishing service on the Idaho defendants.

Rule 4(e) provides "whenever a statute of the United States . . . provides for service of a summons . . . upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the man-

ner prescribed by the statute, rule or order." Section 27 of the 1934 Act provides for worldwide service of process "wherever the defendant may be found." Service is proper on the Idaho officials within that statute.

The Texas Long Arm Statute, art. 2031b, Tex.Rev.Civ. Stat., provides an alternate method of service. It may, of course, be used in cases exclusively within federal question jurisdiction, as well as within diversity jurisdiction. Wright & Miller, Federal Practice and Procedure: Civil § 1075 at 313 (1969). Utilization of art. 2031b carries with it any Texas limitation on personal jurisdiction since Rule 4(e) allows service pursuant to a statute "under the circumstances" allowed by the statute. Service under art. 2031b incorporates Texas standards of amenability to suit which, as discussed above, render the Idaho defendants liable to suit herein. Service of process is also proper under the Texas Long Arm Statute.

Having found that jurisdiction, venue and service of process are proper against Idaho defendants the Court has at last charted its way to the merits of this action. Great Western challenges the validity of the Idaho takeover statute on two grounds. First, Great Western claims that Congress has preempted the Idaho takeover statute pursuant to the Supremacy Clause, Article VI, Clause 2 of the United States Constitution; and second, Great Western claims that the Idaho takeover statute violates the Commerce Clause, Article 1, Section 8, of the United States Constitution.

IX. Doctrine of Preemption

Article VI, Clause 2 of the United States Constitution provides in relevant part:

> "This Constitution, and the Laws of the United States . . . shall be the Supreme Law of the Land."

In order to effect the Supremacy Clause, the courts have developed the doctrine of federal preemption. The doctrine renders state laws invalid if their effect is to create an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[15]

An analysis of preemption decisions leads this court to the conclusion that this area is imbued with result-oriented decisions which tend to comport with the philosophical leanings of the Supreme Court. This court discerns several tests which have been applied for the Supreme Court to determine whether a state statute is preempted by a federal statute. Applicability of any one of these tests will render the Idaho takeover statute preempted by the Williams Act.

First, a state statute is preempted if it is apparent from federal statutes, their legislative histories, or the pervasiveness of the federal regulatory scheme that Congress intended to occupy the field and displace state regulations. Second, a state statute is preempted if it affects a field in which the federal interest is so dominant as to preclude state laws regulating the same subject. Finally, a state statute is preempted if it conflicts with the federal law to

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[15] *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

such an extent as to be an obstacle to the accomplishment of the federal scheme.

A. *Congressional Occupation of the Field*

Congressional intent to fully occupy a field may be expressly stated or may be circumstantially inferred. In *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1946), Justice Douglas listed various inferential approaches to Congressional occupation of a field:

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of the obligations imposed by it may reveal the same purpose. . . .

Despite the many persuasive arguments about the pervasiveness of federal securities regulation, the need for national uniformity in this area, and the dominant federal interest therein, one impassable obstacle looms across this road to preemption. Great Western states in its brief: "For over forty years Congress has occupied the field of regulation of the securities markets." Plaintiff's Supplemental Memorandum (5/20/77) at 25. For this same period of time federal securities laws have coexisted with state securities laws.[16] Such coexistence would be impossible if

[16] "Of course, under securities laws state regulation may coexist with that offered under the federal securities laws." *SEC v. National Securities*, 393 U.S. 453, 461, 89 S.Ct. 564, 569, 21 L.Ed.2d 668 (1969).

Congress has occupied the field. Great Western can analogize to areas in which Congress has occupied the field, e. g., aviation, but it can point to no precedents consistently driving the states out of the field of securities regulation such as exist in the area of aviation. There is no way around the fact that state and federal securities laws presently coexist to some extent. The Williams Act does not occupy the field of tender offer legislation.

B. *Dominance of Federal Interest*

Nor is the federal interest in the securities market so dominant as to preempt state securities legislation. Federal control of the securities field is not "intensive and exclusive" as is federal control over aviation. States have a valid interest in regulation of securities sold within their borders and state statutes have existed regulating this area for some time. The dominance of the federal interest in securities does not preempt state statutes.

C. *Conflict Between the State and Federal Schemes*

A state statute may also be preempted by a federal law if it is in conflict with the federal law. A brief history of the Williams Act is helpful in this regard.

Congress did not concern itself with the federal regulation of cash tender offers until the 1960s, when the use of the cash tender offer had become popular due to its advantages over use of full-blown proxy contests. In 1965, Senator Harrison Williams introduced the first legislative proposals for regulation of tender offers. Senator Williams' first bill would have required any person making an offer to file certain information with the target company and with the Securities and Exchange Commission (SEC) twenty days in advance of the offer to shareholders. This

approach was criticized by the SEC and Senator Williams subsequently introduced a bill following the SEC's recommendation that a confidential statement be filed with the SEC five days before the offer was made to shareholders. This version of the bill met objection from members of Congress and the New York and American Stock Exchanges.

As enacted in 1968, the Williams Act contained no requirement whatsoever that an offeror make disclosure to a government agency in advance of the offer to shareholders. The Act requires disclosure of a minimal amount of information which would generally be necessary for an investor to make a reasonable decision whether to tender his shares, including the identity of persons on whose behalf purchases are to be effected, the source and amount of funds of the offeror, any plans of the offeror to liquidate, sell or merge the target company, the number of shares owned by the offeror and any contracts between the offeror and the target company. 15 U.S.C. § 78m(d)(1).

The legislative history of the bill makes it clear that the Williams Act was not designed to obstruct legitimate takeover bids, but to "balance the scales equally to protect the legitimate interests of the corporation, management, and shareholders without unduly impeding cash takeover bids." 113 Cong.Rec. 854 (1967). After the Williams Act was passed, many states began enacting statutes regulating the making of tender offers of target companies having nexus in their states. The state takeover statutes base their jurisdiction on one of several connections with the State. The Idaho statute under consideration purports to regulate the tender of stock of any target company which

is an Idaho corporation, has its principal office in Idaho or has "substantial assets" located in Idaho. Idaho Code § 30-1501(6).

Substantively, the Idaho statute differs significantly from the requirements of the Williams Act. First, while the Idaho statute requires the offeror to provide information required by the Williams Act, it also requires other more detailed information. Some of the information, such as a description of business done by the offeror and material changes therein in the prior three years, seems only collaterally related to that information that a shareholder would require in deciding whether or not to tender his stock.

Second, while the Williams Act has no waiting period after filing the applicable information before an offer may be made, the Idaho act requires that a registration statement be declared effective by the Director of the Department of Finance before the offer can commence. Further, the management of the target company can demand a hearing which the State of Idaho is required to provide within twenty (20) days after the date of filing. A decision must be made within thirty (30) days after the hearing, but this time period may be extended. If a hearing is called the offer shall not become effective until registered by order of the Director of the Department of Finance. Idaho Code § 30-1504. Thus the management of the target company can unquestionably delay the institution of a tender offer for several weeks in which to marshal its resources.

Third, while the Williams Act requires the offeror to file the required information with the SEC under all cir-

cumstances, the Idaho Act does not require compliance with Idaho law if the target company's board of directors recommends acceptance of the tender to its shareholders. Idaho Code § 30-1501(5)(e).

It is clear that the Idaho statute conflicts with and frustrates the clear purposes of the Williams Act. The State of Idaho strongly maintains that a conflict exists rendering preemption applicable only if the state statute renders it impossible to comply with the federal standards. But a conflict may also exist when the state statute frustrates a Congressional purpose. Wilner and Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality,* 45 Fordham L.Rev. 1, 23 (1976). The court is of the opinion that absolute impossibility of compliance with both laws is not necessary to a finding of preemption. Indeed, in *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 145, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), the converse is indicated: If impossibility of compliance does not exist, then further inquiry is necessary.

This court is of the opinion that the Idaho statute conflicts with the Williams Act by destroying the careful balance struck in the Williams Act between the offeror and the management of the target company designed to protect the interests of the shareholders. It is clear from examination of the legislative history and the Act itself that Congress' purpose in enacting the Williams Act was to let tender offers go forward for the benefit of shareholders. It is equally clear that the purpose of the Idaho takeover statute is to inhibit tender offers for the benefit

of management.[17] This purpose is evident from several provisions of the Idaho statute discussed above. By providing that a hearing must be held for the protection of the Idaho shareholders if "requested by the target company acting through its Board of Directors," the Idaho statute gives management an absolute right to an administrative hearing prior to the time any tender may be made. If Idaho had the public interest in mind, any advance administrative review would be vested in a state agency which could hold hearings when necessary. The Idaho statute supplies management of the target company with a delay mechanism for use at its discretion. In contrast, the Williams Act provides for no administrative review prior to the time a tender is made.

Further, the Idaho statute provides for an exemption from compliance with the terms of the Idaho statute if the Board of Directors of the target company recommends its acceptance to the stockholders. In contrast, the Williams Act requires compliance with its terms in the case of all tender offers, thus indicating its interest in protection of the shareholders rather than the management.

The Idaho statute thus places the tools of delay—anathema to an offeror—within and only within the reach of management. And the statute blithely removes all impediments of an offer if management approves. There is a conflict of purpose between the Williams Act and the Idaho statute: the William Act regulates the making of tender offers for the benefit of shareholders, while the

[17]Courts may examine unstated purposes of state statutes when evaluating their validity. *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 144-45, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970); *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1, 10, 49 S.Ct. 1, 73 L.Ed. 147 (1928).

Idaho statute regulates the making of tender offers primarily for the benefit of management of the target company. By weighing the scales so heavily in favor of management of target companies, the Idaho statute has destroyed the delicate balance reached by the Williams Act. Because of the conflict that exists, this court is of the opinion that the Idaho takeover statute is preempted by the Williams Act.

X. The Commerce Clause

Article I, Section 8 of the United States Constitution gives Congress the power "to regulate Commerce . . . among the several states" in order to prevent unjustifiable local restraints from interference with commercial intercourse among the states. Not every state statute regulating commerce is unconstitutional, of course. In *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), the Supreme Court stated the criteria for determining whether or not a state statute regulating commerce was constitutional:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

In order to be valid, a state statute regulating commerce must, first, effectuate a legitimate local public interest; second, affect interstate commerce only incidentally and; third, if the first two tests are met, meet a balancing test applied to determine whether or not the burden imposed on commerce is excessive in relationship to the alleged local benefits provided by the statute.

A. *Legitimate Local Interest*

A state statute regulating interstate commerce must first achieve a legitimate local public interest. An examination of the Idaho statute compels this Court to the conclusion that it is neither legitimate nor local in its application.

The primary purpose generally articulated for passage of state takeover laws has been the protection of shareholders of corporations which are incorporated in or have significant connections with the controlling state. In determining whether a state statute effects its articulated purpose a court examines the practical effects of the legislation rather than any statement of purpose contained in the law itself or its legislative history. *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10, 49 S.Ct. 1, 73 L.Ed. 147 (1928).

In any tender offer, there are at least three interested parties who have conflicting interests to some extent: the offeror, the shareholders and the management of the target company. The Williams Act seeks to protect the shareholders and to balance the competing interests of the other two parties. Despite the Idaho defendants' contention that the Idaho statute protects the interest of shareholders, this court finds that the immediate purpose of the statute is to protect incumbent management.

The presence of the Idaho statute might work to the detriment of shareholders in several ways. First, the statute enables management of an unwilling target company to delay and frustrate the making of the offer by invoking the administrative procedure of the takeover statute. Second, the presence of the statute might dissuade a po-

tential offeror from making an offer where it is faced with one or more onerous state takeover statutes.

Third, there was evidence presented that the presence of the statute might discourage an offeror from initially announcing its top offer. In some such cases the offeror holds the top offer back from shareholders and discloses it to target company management only in hopes of obtaining management's approval of the offer. By obtaining such approval the offeror negates the necessity of complying with the takeover statute. In those cases where a friendly arrangement cannot be consummated, the shareholders might never have an opportunity to consider and accept the higher offer made only to management. Fourth, the presence of the statute might induce the offeror to reduce its originally announced offer price where it encounters resistance resulting from management's utilizing delays permitted by the takeover statute. In such case shareholders could also be deprived of the opportunity to consider and accept the original and higher offer.

The ultimate purpose of the Idaho statute is to thwart tender offers and thereby prevent possible removal of the target company or its management, the closing of plants and related effects on the state's economy. But a state may not legitimate its regulation of interstate commerce by asserting this type of interest. As stated by the Supreme Court in *Hood & Sons v. Du Mond,* 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1949), a statute may not be enacted "solely for protection of local economic interests."

Nor does the Idaho statute have only local application. The terms of the statute apply not only to the corporations

incorporated under the statutes of Idaho, having their main office in Idaho or having "substantial assets in Idaho," they also affect shareholders domiciled outside the state. The Idaho statute provides that tender offers may not be made to non-Idaho shareholders without being made to Idaho shareholders also. Idaho Code § 30-1506. The Idaho statute thus undertakes to regulate the offeror's affairs not only within Idaho, but within all states in which the offeror might make a tender offer. This intended extraterritorial effect distinguishes the takeover statute from state Blue Sky laws, which clearly do not intend to govern regulation of securities outside state boundaries.

Idaho has shown no legitimate local interests in protection of shareholders in other states. In short, the Idaho defendants have not demonstrated that the state takeover statute regulates a legitimate local interest.

B. *Effect on Interstate Commerce*

The second of the *Pike* criteria inquires whether the burden of the local law affects interstate commerce incidentally or significantly. It is clear that the Idaho takeover law purposefully precludes Great Western's making a tender offer anywhere until the provisions of the Idaho statute have been met. The Idaho takeover statute has a substantial effect on interstate commerce.

C. *The Balancing Test: Interstate Burden v. State Benefit*

Having failed the first two *Pike* criteria, it is not necessary for the court to apply the balancing test. Assuming arguendo that it is necessary to do so the court makes the following findings.

The testimony at the trial of this case indicated that there may well be some benefits to shareholders by a waiting period prior to making of a tender offer. The evidence indicated that once an announcement of a tender is made, the value of shareholders' stock tends to rise. In some cases, the offeror must raise its tender price as the value of the shares rises due to the initial tender. In other cases the management of the target company might make a tender for shares of its stock also in excess of the market value. But the provisions of the Idaho statute do not guarantee these possible benefits to shareholders will actually take place. If management is satisfied with a tender offer, the Idaho statute never even comes into play to delay the offer. Thus any benefits that would be derived to the shareholders by the terms of the Idaho statute are by no means assured.

Weighed against this contingent benefit to shareholders is the burden that the Idaho statute places on interstate commerce. Evidence at trial showed that takeover statutes have a tendency to discourage offerors from making tender offers and that the very presence of state takeover statutes might eliminate the possibility of a tender offer being made. Further, compliance by an offeror with one state statute interferes with commerce; compliance with many state statutes (as in a tender for a large target company) would unquestionably have a deleterious effect on interstate commerce.

Even after compliance with the takeover statutes, their provisions would have several other effects on interstate commerce. First, evidence showed that the takeover statutes encourage offerors to make lower offers than would have

been made without the statute. Second, the waiting and announcement period of the Idaho statute might well have a disruptive effect on the stock of the target company, perhaps to the extent that there would be little market for the stock while the waiting periods were complied with. Finally, the waiting periods would permit management of a target company to delay the tender offer for varying periods during which time they could merge with another company, appeal to the shareholders not to sell their shares, make long term management contracts with target company personnel, or attempt to purchase the shares themselves. The Idaho statute violates the Commerce Clause and the Idaho defendants should be enjoined from enforcing the statute.

XI. Conclusion

The legislative history and contents of the Williams Act lead this Court to conclude that Congress intended to regulate the making of cash tender offers. The Idaho takeover statute, Idaho Code §§ 30-1501 to 1513 (Supp. 1975), effectively destroys the Congressional plan for the making of such tender offers and is therefore preempted by the Williams Act. Further, the Idaho takeover statute does not fulfill a legitimate local interest but, to the contrary, has a pervasive effect on interstate commerce that violates the Commerce Clause of the United States Constitution. The relief sought by Great Western for a declaratory judgment and injunctive relief against the Idaho defendants should be granted.

The parties will submit a Judgment in accordance with this Opinion.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Civil No. 77-2809

[Filed October 23, 1978]

Great Western United Corporation,
Plaintiff-Appellee,

vs.

Wayne L. Kidwell, Attorney General of Idaho,
Defendant,

Tom D. McEldowney, Director of the Department of Finance of the State of Idaho,
Defendant-Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Wayne L. Kidwell, Attorney General of Idaho, and Tom D. McEldowney, Director of the Department of Finance of the State of Idaho, defend-

ants above named, hereby appeal to the Supreme Court of the United States from the decision of the above entitled Court entered on the 10th day of August 1978 affirming the Memorandum Decision of the United States District Court for the Northern District of Texas, Dallas Division, entered on the 2d day of September 1977.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Dated this 20th day of October, 1978.

/s/ Peter E. Heiser, Jr.
Special Deputy Attorney General
Counsel for Said Defendants

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on the 20th day of October 1978, I served a true and correct copy of the above and foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES upon:

Ivan Irwin, Esq.
Al B. Conant, Jr., Esq.
Shank, Irwin, Conant, Williamson & Grevelle
2827 First National Bank Building
Dallas, Texas 75202
Attorneys for Plaintiff-Appellee

by placing a copy thereof in the United States Mail, first class postage prepaid, in a sealed envelope addressed to said individuals at the above address, which is the last address of said individuals known to me.

/s/ Peter E. Heiser, Jr.

Wayne L. Kidwell
Attorney General, State of Idaho
Statehouse, Room 210
Boise, Idaho 83720
Telephone: (208) 384-2400

Peter E. Heiser, Jr.
4060, 212th Way S.E.
Issaquah, Washington 98027
Tel: (206) 392-3439
Special Deputy Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

Civil Action

No. CA3-77-0405-D

Great Western United Corporation,
Plaintiff,

vs.

Wayne L. Kidwell, Attorney General of Idaho, et al.,
Defendants.

[Filed October 24, 1978]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Wayne L. Kidwell, Attorney General of Idaho, and Tom D. McEldowney, Director of the Department of Finance of the State of Idaho, defendants above named, hereby appeal to the Supreme Court of the United States from the Memorandum Decision of

the above entitled court entered on the 2d day of September 1977 as affirmed by the United States Court of Appeals for the Fifth Circuit on the 10th day of August 1978.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Dated this 20th day of October 1978.

/s/ Peter E. Heiser, Jr.
Special Deputy Attorney General
Counsel for Said Defendants

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on the 20th day of October 1978, I served a true and correct copy of the above and foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES upon:

Ivan Irwin, Esq.
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Shank, Irwin, Conant, Williamson & Grevelle
2827 First National Bank Building
Dallas, Texas 75202
Attorneys for Plaintiff

by placing a copy thereof in the United States Mail, first class postage prepaid, in a sealed envelope addressed to said individuals at the above address, which is the last address of said individuals known to me.

/s/ Peter E. Heiser, Jr.

15 U.S.C. § 78m(d, e) (1970)

(d)(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78*l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78*l*(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds

is a loan made in the ordinary course of business by a bank, as defined in section 78c(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as

necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(6) The provisions of this subsection shall not apply to—

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933;

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

(C) any acquisition of an equity security by the issuer of such security;

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e) (1) It shall be unlawful for an issuer which has a class of equity securities registered pursuant to section 78*l* of this title, or which is a closed-end investment company registered under the Investment Company Act of 1940, to purchase any equity security issued by it if such purchase is in contravention of such rules and regulations as the Commission, in the public interest or for the protection of investors, may adopt (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices. Such rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and such addition information, as the Commission deems necessary or appropriate in the public interest or for the protection of investors, or which

the Commission deems to be material to a determination whether such security should be sold.

(2) For the purpose of this subsection, a purchase by or for the issuer or any person controlling, controlled by, or under common control with the issuer, or a purchase subject to control of the issuer or any such person, shall be deemed to be a purchase by the issuer. The Commission shall have power to make rules and regulations implementing this paragraph in the public interest and for the protection of investors, including exemptive rules and regulations covering situations in which the Commission deems it unnecessary or inappropriate that a purchase of the type described in this paragraph shall be deemed to be a purchase by the issuer for purposes of some or all of the provisions of paragraph (1) of this subsection.

15 U.S.C. § 78n(d-f) (1970)

(d) (1) It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 78*l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78*l*(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time

copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in section 78m(d) of this title, and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors, and shall be filed with the Commission not later than the time copies of such material are first published or sent or given to security holders. Copies of all statements, in the form in which such material is furnished to security holders and the Commission, shall be sent to the issuer not later than the date such material is first published or sent or given to any security holders.

(2) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for purposes of this subsection.

(3) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(4) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(5) Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors.

(6) Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be

pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders.

(7) Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

(8) The provisions of this subsection shall not apply to any offer for, or request or invitation for tenders of, any security—

(A) if the acquisition of such security, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, would not exceed 2 per centum of that class;

(B) by the issuer of such security; or

(C) which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any ma-

terial fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

(f) If, pursuant to any arrangement or understanding with the person or persons acquiring securities in a transaction subject to subsection (d) of this section or subsection (d) of section 78m of this title, any persons are to be elected or designated as directors of the issuer, otherwise than at a meeting of security holders, and the persons so elected or designated will constitute a majority of the directors of the issuer, then, prior to the time any such person takes office as a director, and in accordance with rules and regulations prescribed by the Commission, the issuer shall file with the Commission, and transmit to all holders of record of securities of the issuer who would be entitled to vote at a meeting for election of directors, information substantially equivalent to the information which would be required by subsection (a) or (c) of this section to be transmitted if such person or persons were nominees for election as directors at a meeting of such security holders.

Idaho Code §§ 30-1501 to 30-1513

CHAPTER 15

Corporate Take-Overs

30-1501. Definitions.—When used in this chapter, unless the context otherwise requires:

(1) "Director" means the director of the department of finance.

(2) "Equity security" means any shares of stock or similar securities, or any securities convertible into such securities, or carrying any warrant or right to subscribe to or purchase such securities, or any such warrant or right, or any other security which, for the protection of investors, is deemed an equity security pursuant to rule of the director.

(3) "Offeror" means a person who makes or in any way participates in making a take-over offer, and includes all affiliates and associates of that person, and all persons acting jointly or in concert for the purpose of acquiring, holding or disposing of or exercising any voting rights attached to the equity securities for which a take-over offer is made. "Offeror" does not include any bank or broker-dealer loaning funds to an offeror in the ordinary course of its business, or any bank, broker-dealer, attorney, accountant, consultant, employee, or other person furnishing information or advice to or performing ministerial duties for an offeror, and not otherwise participating in the take-over offer.

(4) "Offeree" means the beneficial owner of equity securities which an offeror acquires or offers to acquire in connection with a take-over offer.

(5) "Take-over offer" means the offer to acquire or the acquisition of any equity security of a target company, pursuant to a tender offer or request or invitation for tenders, if after the acquisition thereof the offeror would be directly or indirectly a beneficial owner of more than five per cent (5%) of any class of the outstanding equity securities of the issuer. "Take-over offer" does not include an offer or acquisition of any equity security of a target company pursuant to:

(a) Brokers' transactions effected by or through a broker-dealer in the ordinary course of its business.

(b) An exchange offer for securities of another issuer, if the offer is exempted from registration or is registered under chapter 14, title 30, Idaho Code, and does not involve any public offering under the Securities Act of 1933.

(c) An offer made to not more than ten (10) persons in this state during any period of twelve (12) consecutive months.

(d) An offer made to all the stockholders of the target company, if the number of its stockholders does not exceed one hundred (100) at the time of the offer.

(e) An offer as to which the target company, acting through its board of directors, recommends acceptance to its stockholders, if the offer is made to all stockholders on substantially equal terms.

(f) An offer if the acquisition of any equity security pursuant thereto, together with all other

acquisitions by the offeror of securities of the same class during the preceding twelve (12) months, would not exceed two per cent (2%) of that class of the outstanding equity securities of the issuer.

(g) An offer by the target company to acquire its own equity securities.

(6) "Target company" means a corporation or other issuer of securities which is organized under the laws of this state or has its principal office in this state, which has substantial assets located in this state, whose equity securities of any class are or have been registered under chapter 14, title 30, Idaho Code, or predecessor laws or section 12 of the Securities Exchange Act of 1934, and which is or may be involved in a take-over offer relating to any class of its equity securities. [I.C., § 30-1501, as added by 1975, ch. 248, § 1, p. 662.]

30-1502. Filing of ownership information.—(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a target company, is directly or indirectly a beneficial owner of more than five per cent (5%) of any class of the outstanding equity securities of the issuer shall, within ten (10) days after such acquisition, file with the director on a form prescribed by him a statement containing the following information and such additional information as the director by rule prescribes:

(a) The identity and background of all persons on whose behalf the acquisition of any equity security of the target company has been or is to be effected.

(b) The source and amount of funds or other consideration used or to be used in acquiring any equity security, including a statement describing any securities which are being offered in exchange for the equity securities of the target company, and if any part of the acquisition price is or will be represented by borrowed funds or other consideration, a description of the transaction and the names of the parties thereto.

(c) If the purpose of the acquisition is to gain control of the target company, a statement of any plans or proposals which such person has, upon gaining control, to liquidate the target company, sell its assets, effect its merger or consolidation or make any other major change in its business, corporate structure, management or personnel.

(d) The number of shares or units of any equity security of the target company of which each such person and each associate of such person and each person included as an offeror is the beneficial owner or which each such person has a right to acquire, directly or indirectly, together with the name and address of each such person.

(e) Material information as to any contracts, arrangements or understandings with any person with respect to any equity security of the target company, including transfers of any equity security, joint ventures, loan or option arrangements, puts and calls, guarantees of loan, guarantees against loss, guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with

whom such contracts, arrangements or understandings have been entered into.

(2) If the target company is an issuer the acquisition of whose equity securities is subject to the requirements of section 13(d) of the Securities Exchange Act of 1934, any person may file with the director a signed copy of the statement prescribed therein in lieu of the statement prescribed in section 30-1502(1), Idaho Code.

(3) Any person may file with the director, in lieu of the statement prescribed in section 30-1502(1), Idaho Code, and unless otherwise ordered by the director, a statement containing his name and address, the number of shares or units of any equity security of the target company which are beneficially owned directly or indirectly by him and each of his associates, the date of their acquisition and such other information as the director may by rule prescribe, if he certifies that such securities were acquired by him, in the ordinary course of his business and not for the purpose or having the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect, and that he does not intend to make a take-over offer involving the target company.

(4) If any material change occurs in the facts set forth in the statement, the person filing the statement shall, within ten (10) days thereafter, file with the director an amendment describing the change, in accordance with such rules as the director prescribes.

(5) Each person required to file any statement or amendment thereto with the director under this section

shall send a signed copy of such statement or amendment by certified mail to the target company at it principal office not later than the date of filing.

(6) No person required to file any ownership statement under this section, who is delinquent in the filing of such statement, may file a registration statement relating to a proposed take-over for a period of sixty (60) days after the date of filing of the ownership statement, except as may be permitted by order of the director. [I.C., § 30-1502, as added by 1975, ch. 248, § 1, p. 662.]

30-1503. Registration of take-over offers.—(1) It is unlawful for any person to make a take-over offer involving a target company in this state, or to acquire any equity securities of a target company pursuant to the offer, unless the offer is effective under this chapter or is exempted by rule or order of the director. Before a take-over offer becomes effective under this chapter, the offeror shall file with the director a registration statement containing the information prescribed in section 30-1503(2), Idaho Code, and send a copy of the registration statement by certified mail to the target company at its principal office and publicly disclose the material terms of the proposed offer, not later than the date of filing of the registration statement.

(2) The registration statement shall be filed on forms prescribed by the director, and shall be accompanied by a consent by the offeror to service of process specified in section 30-1436, Idaho Code, and the filing fee specified in section 30-1508, Idaho Code, and shall contain the following information and such additional information as the director by rule prescribes:

(a) All of the information specified in section 30-1502(1), Idaho Code, any part of which may be incorporated by reference to the extent that it was previously filed.

(b) Three (3) copies of the proposed take-over offer, including all material terms thereof, in the form proposed to be published or sent or delivered to security holders of the target company.

(c) Material information concerning the organization and operations of any offeror which is a corporation, including the year, form and jurisdiction of its organization, a description of each class of its capital stock and long-term debt, a description of the business done by the offeror and its subsidiaries and any material changes therein during the past three (3) years, a description of the location and character of the principal properties of the offeror and its subsidiaries, a description of any material pending legal or administrative proceedings in which the offeror or any of its subsidiaries is a party, the names of all directors and executive officers of the offeror and their material business activities and affiliations during the past three (3) years, and financial statements of the offeror for its three (3) most recent annual accounting periods and any current period.

(d) Material information concerning the identity and background of any offeror who is not a corporation, including his material business activities and affiliations during the past three (3) years, and a description of any material pending legal or administrative proceedings in which the offeror is a party.

(3) The director may require the offeror to file any other documents, exhibits and information that he deems material to the take-over offer, and he may permit the omission of any of the information specified in section 30-1503(2), Idaho Code, if he determines that such information is not required for the protection of offerees. The director may by order summarily delay the effective date of the offer if he determines that the registration statement does not contain all of the information specified in section 30-1503(2), Idaho Code, or does not provide full disclosure to offerees of all material information concerning the offer.

(4) A take-over offer becomes effective when approved by the director. The director may call a hearing if he deems it necessary or appropriate for the protection of offerees in this state, and shall call a hearing if so requested by the target company, acting through its board of directors. If a hearing is called, the offer shall not become effective until registered by order of the director.

(5) Any hearing called by the director under this section shall be held within twenty (20) days of the date of filing of the registration statement under section 30-1503(1), Idaho Code, and any determination made following the hearing shall be made within thirty (30) days after such filing, unless extended by order of the director for the convenience of the parties or for the protection of offerees in this state. If, the following the hearing, the director finds that the take-over offer fails to provide for full disclosure to offerees of all material information concerning the offer, or will not be made to all stockholders on substantially equal terms or is in violation of chapter 14, title 30, Idaho

Code, he shall by order deny registration of the offer. Registration of the offer is not deemed approval of the offer by the director. [I.C., § 30-1503, as added by 1975, ch. 248, § 1, p. 662.]

30-1504. Filing of solicitation materials.—(1) Copies of all advertisements, circulars, letters or other materials published by the offeror or the target company, soliciting or requesting the acceptance or rejection of the take-over offer, shall be filed with the director and sent to the target company or offeror, respectively, not later than the time copies of such solicitation materials are first published or used or sent to security holders of the target company.

(2) Solicitation materials used in connection with a take-over offer shall not contain any false statement of a material fact or omit to state a material fact necessary to make the statement therein not misleading. The director may by rule or order prohibit the use of any solicitation materials deemed false or misleading. [I.C., § 30-1504, as added by 1975, ch. 248, § 1, p. 662.]

30-1505. Fraudulent and deceptive practices.—It is unlawful for any offeror or target company or any controlling person of an offeror or target company or any broker-dealer acting on behalf of an offeror or target company to engage in any fraudulent, deceptive or manipulative acts or practices in connection with a take-over offer. Fraudulent, deceptive and manipulative acts or practices include, without limitation:

(1) Publication or use in connection with the offer of any false statement of a material fact or omitting to state a material fact necessary to make the state-

ments made by him not misleading, but not including the mailing by a target company to its stockholders of solicitation materials published by an offeror.

(2) Sale by any controlling stockholders of a target company in connection with a take-over offer of all or part of their equity securities to the offeror at a price higher than that to be paid other stockholders pursuant to the offer.

(3) Refusal by a target company to permit an offeror who is a stockholder of record to examine its list of stockholders, and to make extracts therefrom, pursuant to the applicable corporation statute, for the purpose of making a take-over offer in compliance with this chapter.

(4) Acquisition by or through a broker-dealer acting on behalf of an offeror of any equity security of the target company in connection with a take-over offer unless the broker-dealer files with the director such information as he requires and to the extent permitted by rule or order by the director, or unless the broker-dealer did not know and in the exercise of reasonable care could not have known that the person for whom it acted was an offeror or that the acquisition was in connection with a take-over offer. [I.C., § 30-1506, as added by 1975, ch. 248, § 1, p. 662.]

30-1506. Limitations on offerors.—(1) No offeror may make a take-over offer involving a target company which is not made to all its stockholders in this state, or which is not made to stockholders in this state on substantially the same terms as the offer is made to stockholders outside this state.

(2) An offeror shall provide that any equity securities of a target company deposited or tendered pursuant to a take-over offer may be withdrawn by or on behalf of any offeree at any time within seven (7) days from the date the offer has become effective under this chapter and after sixty (60) days from the date the offer has become effective under this chapter, except as the director may otherwise prescribe by rule or order for the protection of investors.

(3) If an offeror makes a take-over offer for less than all the outstanding equity securities of any class, and if the number of securities deposited or tendered pursuant thereto within ten (10) days after the offer has become effective under this chapter and copies of the offer, or notice of any increase in the consideration offered, are first published or sent or given to security holders is greater than the number the offeror has offered to accept and pay for, the securities shall be accepted pro rata, disregarding fractions, according to the number of securities deposited or tendered by each offeree.

(4) If an offeror varies the terms of a take-over offer before its expiration date by increasing the consideration offered to security holders, the offeror shall pay the increased consideration for all equity securities accepted, whether such securities have been accepted by the offeror before or after the variation in the terms of the offer.

(5) No offeror may make a take-over offer involving a target company, or acquire any equity securities of a target company pursuant to the offer, at any time when an administrative or injunctive proceeding has been brought by the director against the offeror for violation of this chapter that has not been finally determined.

(6) No offeror may acquire, remove or exercise control, directly or indirectly, over any assets of a target company located in this state in connection with a take-over offer unless the take-over offer is effective or exempt under this chapter, except as permitted by order of the director. [I.C., § 30-1506, as added by 1975, ch. 248, § 1, p. 662.]

30-1507. Administration, rules and orders.—(1) This chapter shall be administered by the director of the department of finance, who may exercise all powers granted to him under chapter 14, title 30, Idaho Code, which are not inconsistent with this chapter.

(2) The director may make rules necessary to carry out the purposes of this chapter, including, without limitation, the definition of terms used in this chapter.

(3) The director may by rule or order exempt from any provisions of this chapter take-over offers that he determines are not made for the purpose or do not have the effect of changing or influencing the control of a target company or where compliance with this chapter is not necessary for the protection of the stockholders of the target company, and he may similarly exempt any persons from the filing of statements under this chapter.

(4) The director may by order direct any person to file any statement provided for in this chapter if it appears that such person is required to file such statement and is delinquent in the filing of such statement. [I.C., § 30-1507, as added by 1975, ch. 248, § 1, p. 662.]

30-1508. Fees and expenses.—(1) For each registration statement filed by an offeror, the offeror shall pay a filing fee based upon the cost to the department of finance to

examine and evaluate the registration statement in accordance with schedules adopted by the director. The schedules adopted by the director shall be designed to assure that the fees collected shall be sufficient to cover the cost of administering this act.

(2) All of the expenses reasonably attributable to any hearing held under this chapter shall be charged ratably to the offeror and the target company but the total amount charged shall not exceed one thousand five hundred dollars ($1,500). [I.C., § 30-1508, as added by 1975, ch. 248, § 1, p. 662.]

30-1509. Injunctions.—Whenever it appears to the director that any person, including a controlling person of an offeror or target company, has engaged or is about to engage in any act or practice constituting a violation of this chapter or any rule or order hereunder, he may bring an action in the name of the state in any court of competent jurisdiction to enjoin the acts or practices and to enforce compliance with this chapter or any rule or order hereunder, or he may refer the matter to the attorney general or the proper prosecuting attorney. Upon a proper showing, the court may grant a permanent or temporary injunction or restraining order or may order rescission of any sales or purchases of securities determined to be unlawful under this chapter or any rule or order hereunder. The court may not require the director to post a bond. [I.C., § 30-1509, as added by 1975, ch. 248, § 1, p. 662.]

30-1510. Criminal penalties.—(1) Any person, including a controlling person of an offeror or target company, who wilfully violates this chapter or any rule under this chapter, or any order of which he has notice, may be fined not

more than five thousand dollars ($5,000) or imprisoned not more than three (3) years or both. Each of the acts specified shall constitute a separate offense and a prosecution or conviction for any one of such offenses shall not bar prosecution or conviction for any other offense. No indictment or information may be returned under this chapter more than three (3) years after the alleged violation.

(2) The director may refer such evidence as is available concerning violations of this chapter or of any rule or order hereunder to the attorney general or the proper prosecuting attorney who may, with or without reference, institute the appropriate criminal proceedings under this chapter. If referred to a prosecuting attorney, he shall within ninety (90) days file with the director a statement concerning any action taken or, if no action has been taken, the reasons therefor.

(3) Nothing in this chapter limits the power of the state to punish any person for any conduct which constitutes a crime under any other statute. [I.C., § 30-1510, as added by 1975, ch. 248, § 1, p. 662.]

30-1511. Civil liabilities.—(1) Any offeror who purchases a security in connection with a take-over offer not in compliance with this chapter or by means of an untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, shall be liable to the person selling the security to him, who may sue either at law or in equity to recover the security, plus any income received by the purchaser thereon, upon tender of the consideration received, or for damages. Damages are the excess of either the value of the security on the date of purchase or its present value, whichever is greater, over the present value of the consideration received for the security. Tender requires only notice of willingness to pay the amount specified in exchange for the security. Any notice may be given by service as in civil actions or by certified mail to the last known address of the person liable.

(2) Every person who directly or indirectly controls a person liable under section 30-1511(1), Idaho Code, every partner, principal executive officer or director of such person, every person occupying a similar status or performing similar functions, every employee of such person who materially aids in the act or transaction constituting the violation, and every broker-dealer or agent who materially aids in the act or transaction constituting the violation, is also liable jointly or severally with and to the same extent as such person, unless the person liable hereunder proves that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

(3) No action may be maintained under this section unless commenced before the expiration of three (3) years after the act or transaction constituting the violation.

(4) The rights and remedies under this chapter are in addition to any other rights or remedies that may exist at law or in equity. [I.C., § 30-1511, as added by 1975, ch. 248, § 1, p. 662.]

30-1512. Application of chapter.—(1) If the target company is an insurance company subject to regulation by the director of the department of insurance, a banking corporation subject to regulation by the director of the department of finance, a savings and loan association subject to regulation by the director of the department of finance, or a public utility subject to regulation by the public utilities commission, the director shall promptly furnish a copy of the registration statement filed under this chapter to the regulatory agency having supervision of the target company. Any hearing under this chapter involving any such target company shall be held jointly with the regulatory agency having supervision, and any determination following the hearing shall be made jointly with that regulatory agency.

(2) If the target company is a public utility, public utility holding company, national banking association, bank holding company or savings and loan association subject to regulation by a federal agency and the take-over of such company is subject to approval by that agency, this chapter shall not apply.

(3) This chapter shall not apply to any offer involving a class vote by stockholders of the target company, pursuant to its articles of incorporation or the applicable corporation statute, on a merger, consolidation or sale of corporate assets in consideration of the issuance of securities of another corporation, or sale of its securities in exchange for cash or securities of another corporation. [I.C., § 30-1512, as added by 1975, ch. 248, § 1, p. 662.]

30-1513. Application of securities law.—All of the provisions of chapter 14, title 30, Idaho Code, which are not in conflict with this chapter shall apply to any take-over offer involving a target company. [I.C., § 30-1513, as added by 1975, ch. 248, § 1, p. 662.]

JOHN V. EVANS
Governor

(SEAL)
STATE OF IDAHO
Department of Finance
Boise 83720
Tom D. McEldowney
Director

March 25, 1977

Steven C. Metzger
2827 First National Bank Building
Dallas, Texas 75202

Re: Great Western United Corporation Offer to Purchase Shares of Common Stock of Sunshine Mining Company and the Registration of Such Offer Under Title 30, Chapter 15, Idaho Code and the Regulations Adopted Thereunder.

Dear Mr. Metzger:

During the afternoon of March 21, 1977, Mr. David J. Wagnon, Vice-President of Western Investment Company, a subsidiary of Great Western United Corporation and Mr. Robert L. Magnuson attorney of the law firm Witherspoon, Kelley, Davenport & Toole, Spokane, Washington, hand delivered an application for registration under the Idaho Corporate Take-Over Law on behalf of Great Western United Corporation to this office.

We have reviewed the application of registration and the proposed form of Offer to Purchase for compliance with the Idaho Code and appropriate regulations thereunder. We present the following comments:

(1) Pages six through ten are missing from schedule 13D which has been marked as exhibit 1A under the application for registration.

(2) We ask that schedule A of schedule 13D be incorporated in the proposed form of Offer to Purchase.

(3) We ask that page 1 of the proposed form of Offer to Purchase set-forth a table of contents listing Sections 1-15 and identifying each section by their appropriate page numbers. We also ask that Sections 12, 13, 14 and 15 be placed at the front of the proposed form of Offer to Purchase immediately following Section 3 and preceding Section 4 on page 8.

The following comments pertain to the disclosure made within the proposed Offer to Purchase.

On page 29 we ask that the nature of the litigation between Sunshine Mining Company and the Shareholders Committee be disclosed and that the status of Charles E. Schwab be indicated. Disclose what is meant by the statement, "The purchaser understands that the committee has been desolved."

The second paragraph of page 29 begins: "Representatives of the purchaser met with Mr. Schwab on February 10, 1977 and with representatives of both Hecla Mining Company and Silver Dollar Mining Company and Mr. Schwab on February 15, 1977 to ascertain whether the purchaser had an interest in purchasing the shares." Please disclose who arranged those meetings and what communications took place at those meetings.

The second paragraph of page 29 begins: "During the week of February 21, 1977 representatives of the purchaser

visited a mine in the Coeur d'Alene mining district operated by Hecla Mining Company which they were advised had operations generally comparable to those of the company." Please disclose who extended the invitation. Also identify the mine and who advised the representatives that the mine had operations generally comparable to that of Sunshine Company and upon what basis such advice was given.

The second sentence of page 30 states the representatives were also provided by Hecla Mining Company and Silver Dollar Mining Company with certain information and reports. Please disclose the names of the persons who provided such reports and identify the reports. Please furnish one copy of each report to the Department of Finance.

The third sentence of page 31 states, "Upon consummation of the Offer to Purchase, the purchaser intends to further investigate and evaluate the company's mining and other operations. Please disclose the extent of the purchaser's current evaluation and investigation of the company's mining and other operations and also disclose what further investigation and evaluation would be made upon the consummation of the offer.

The second sentence on page 38 states the purchaser believes that the offer will not be effective in the State of Idaho during any such hearing and that the purchaser would not be permitted to purchase or pay for any shares tendered by shareholders in Idaho during such period. This sentence implies that the purchaser would be allowed to make tenders outside the State of Idaho. Section 30-1503(1), *Idaho Code,* states in part: "It is unlawful for any person to make a take-over offer involving a target company in

this state, or to acquire any equity securities of a target company pursuant to the offer, unless the offer is effective under this chapter or is exempted by rule or order of the Director. It is our position that tenders made within and without of the State of Idaho would be unlawful unless the tender offer is effective or exempt under Chapter 15, Title 30 of the Idaho Code.

The provisions of paragraph 3 subpart d under caption *Registration of Take-Over Offers* as set-forth on pages 2 and 3 of the adopted Rules and Regulations under Title 30, Chapter 15, Idaho Code requires that information required of Items 1 through 9 of Form IDF-03-60-75 or an adequate summary thereof be disclosed in the proposed form of Offer to Purchase. We believe that disclosure required by Item 8 of Form IDF-03-60-75 which states: "Material information concerning the organization and operations of any offeror which is a corporation, including the year, form and jurisdiction of its organization, *a description of each class of its capital stock* and *long-term debt,* a description of the business done by the offeror and its subsidiaries and any material changes therein during the past three (3) years, *a description of the location and character of the principal properties of the offeror and its subsidiaries,* a description of any material pending legal or administrative proceedings in which the offeror or any of its subsidiaries is a party, the names of all directors and executive officers of the offeror and their material business activities and affiliations during the past three (3) years, and financial statements of the offeror for its three (3) most recent annual accounting periods and any current period is not adequately disclosed under Section 12 on page 39. Please amend this section to

include additional disclose concerning the items underlined [italicized] in item 8 above.

The last sentence of the first paragraph of page 40 states, "During the fiscal year ended May 31, 1975, the purchaser determined to dispose of "Great Western Cities", but no offers to purchase "Great Western Cities" are being considered at the present. Please disclose the reasons for deciding to dispose of "Great Western Cities".

The first sentence of the second paragraph on page 41 states, "The purchaser has filed with the Commission preliminary proxy material relating to a proposed plan of recapitalization. We ask that a more definitive description of the proposed plan be disclosed indicating any possible affect such plan might have with regard to the Sunshine Company.

We ask that the summary of litigation disclosed beginning on page 44 and ending on page 46, more accurately reflect the legal proceedings disclosed under item 5 in form 10K of Great Western United Corporation.

The second paragraph of page 47 states, "Approximately 33 million dollars required by the purchaser to purchase 2 million shares under the offer will be obtained under a 35 million dollar commitment to Western Investment from a bank from which it has borrowed in the past. You have asked in a separate letter that the identity of the bank be held confidential. We agree to meet this request, however, we ask that one copy of the commitment agreement be furnished to the Department under confidential letter.

The second paragraph on page 49 states, "The purchaser expects that it will not depend upon earnings of the company (except dividends at the current rate annually paid by the company) to repay any borrowings under the commitment and under other presently outstanding indebtness of the purchaser and its subsidiaries. The purchaser does not intend to utilize shares or assets of the company for such purpose." Please disclose how the purchaser expects to repay the borrowings under the commitment.

The last sentence on page 49 states, "The purchasers [sic.] objective in making the offer is to acquire working control of the company." Please define and disclose what is meant by working control of the company.

The second sentence on page 51 states, "Although the purchaser has not decided which additional individuals it might nominate, such nominees will include Messrs., N. B. Hunt, W. H. Hunt and G. Michael Boswell." Please disclose whether or not there are any informal or formal agreements with Hecla Mining Company, Silver Dollar Mining Company or members of the Sunshine Shareholders Committee which would agree to appoint such persons to the Board of Directors of the Sunshine Company on behalf of the purchaser.

The second sentence on page 53 states, "The purchaser believes a stockholder should not be subject to such risk of ordinary income treatment if all of the shares owned by him directly or indirectly were disposed of either pursuant to the offer or at any time prior to the effective date of any future merger or similar combination, etc." We ask that the wording, "subject to such risk" be eliminated from this sentence.

The second paragraph of page 53 states, "Under the laws of the State of Washington any merger, consolidation, liqui-

dation or sale of all or substantially all of the assets of the company would require the affirmative vote of 66⅔ percent of the outstanding shares entitled to vote." Please disclose whether or not under Washington law the purchaser upon obtaining a majority representation of the Board of Directors could instruct such directors to authorize the issuance or sale of the company's authorized but unissued common stock, without the affirmative vote of 66⅔ percent of the outstanding shares entitled to vote. Also describe the affect of such action upon the Sunshine Company if the purchaser decided to take such action.

The second paragraph on page 56 states that if the purchaser acquires control of the company, etc. Please disclose and indicate what is meant by the word "control" as used in that sentence. Also indicate what impact a merger or disposition of some or all of the company's subsidiary and divisions would have on the Sunshine Mining Company and those stockholders who, for whatever reason, do not tender their shares pursuant to this offer and whether or not assets or funds received would be used to repay monies obtained from the bank commitment for this tender offer either directly or indirectly.

The last sentence of the second paragraph on page 56 states, "The purchaser has advised Hecla Mining Company and Silver Dollar Mining Company that it would support reimbursement by the company of the expenses of Hecla Mining Company and Silver Dollar Mining Company in connection with the activities of the Shareholders Committee to maximum of $200,000." It is the Department's view that this reimbursement if made may constitute a violation under Section 30-1505(2), *Idaho Code,* which states in

part: "It is unlawful for any offeror or target company or any controlling person of an offeror or target company or any broker-dealer acting on behalf of an offeror or target company to engage in any fraudulent, deceptive or manipulative acts or practices in connection with a take-over offer. Fraudulent, deceptive and manipulative acts or practices include, without limitation: (2) Sale by any controlling stockholders of a target company in connection with a take-over offer of all or part of their equity securities to the offeror at a price higher than that to be paid other stockholders pursuant to the offer."

Please disclose whether or not the purchaser has or intends to enter into any working or financial agreements other than the March 18, 1977 stock purchase of 335,070 shares of stock in Sunshine Mining Company with Hecla Mining Company, Silver Dollar Mining Company or any member of the dissolved Sunshine Shareholders Committee.

Based upon the above comments and under the provisions of Section 30-1503(3), *Idaho Code,* the Director has summarily ordered a delay of the effective date of the registration and the proposed tender offer.

The Department takes the position that the registration statement filed March 21, 1977 is not complete, as not all of the material information is disclosed. The twenty days referred to in Section 30-1503(5), *Idaho Code,* begins to run from the time a complete registration statement within the meaning of Section 30-1503(2), *Idaho Code,* is received and filed. Therefore, this Department will regard the filing date of Great Western United Corporation registration to be the date upon which the amendments, as requested above,

are received and accepted as complete. The twenty day limit for hearing shall begin to run as of such date.

The Department is prepared to issue a permit granting effectiveness to this registration upon a determination that the requested amendments are complete, contain all of the requested information, and otherwise comply with Chapter 15, Title 30, Idaho Code and the regulations adopted thereunder.

Should Great Western United Corporation decide not to file the amendments as requested, the Director is prepared to call for a hearing on his own initiative, to determine whether or not the application filed on March 21, 1977 contains sufficient disclosure.

Sincerely,
/s/ MELVIN J. BAPTIE
Deputy Administrator-Securities

MJB/rm

In the Office of the Director of Finance,
State of Idaho

In the matter of

Great Western United Corporation's offer to purchase shares of common stock of Sunshine Mining Company

ORDER

WHEREAS, on the afternoon of March 21, 1977, GREAT WESTERN UNITED CORPORATION filed an application for registration under the Idaho Corporate Take-Over Law relating to an offer to purchase shares of common stock of Sunshine Mining Company; and

WHEREAS, Title 30, Chapter 15, *Idaho Code,* known as the Idaho Corporate Take-Over Law, governs the take-over offer filed by GREAT WESTERN UNITED CORPORATION; and

WHEREAS, the administration of the Idaho Corporate Take-Over Law has been placed with the Director, Department of Finance; and

WHEREAS, Section 30-1503(3), *Idaho Code,* provides that the director may by order summarily delay the effective date of the offer if he determines that the registration statement does not contain all of the information specified in section 30-1503(2), *Idaho Code,* or does not provide full disclosure to offerees of all material information concerning the offer; and

WHEREAS, the offering statement has been carefully considered and analyzed; and,

WHEREAS, certain material information has been found to be lacking in the registration statement and the proposed form of Offer to Purchase; and

WHEREAS, the material information not provided in connection with the said take-over offer is fully specified in the letter of comment dated March 25, 1977, given to GREAT WESTERN UNITED CORPORATION, and incorporated in this Order by reference.

NOW THEREFORE, IT IS HEREBY ORDERED THAT the effective date of the offer be delayed.

DONE AND DATED this 25th day of March, 1977.

/s/ Tom D. McEldowney
Director of Finance
State of Idaho

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1677

Great Western United Corporation,
Plaintiff-Appellee,

vs.

Wayne L. Kidwell, Attorney General of Idaho, and Tom D. McEldowney, Director of the Idaho Dept. of Finance,
Defendants-Appellants,

Louis J. Lefkowitz, Attorney General of New York, et al.,
Defendants.

[Filed Apr. 6, 1977]

Appeal from the United States District Court for the Northern District of Texas

Before COLEMAN, GODBOLD and CLARK, Circuit Judges.

BY THE COURT:

The order of the district court entered March 31, 1977, is stayed pending further proceedings in the district court.

The district court is directed to consider the issues of jurisdiction and venue and enter findings of fact and conclusions of law thereon before consideration of the merits. This proceeding involves novel and difficult issues which have broad impact upon federalism. Therefore, should the district court determine that it has jurisdiction and venue, it should consider certification of this determination under 28 U.S.C. § 1292(b) before trial on the merits.

Motions for clarification and for rehearing are DENIED.

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C. 20549

[SEAL] September 26, 1978

Division of Corporation Finance

Richard Goodyear, Esq.
Assistant General Counsel
Occidental Petroleum Corporation
10889 Wilshire Boulevard
Los Angeles, California 90024

SEC File No. 2-62407

Dear Mr. Goodyear:

We have the following comments with respect to the registration statement filed August 21, 1978 on Form S-7 on behalf of your company.

General

(1) It would appear inappropriate, in light of the proceedings in Ohio with respect to such states' takeover laws, to proceed with effectiveness of the registration statement until such time as the offer to Mead shareholders can be made. This, of course, would not necessarily preclude utilization of the information in the registration statement in connection with the solicitation of the Company's shareholders for approval of the acquisition. Please advise.

(2) Please note that the responsibility for adequate and accurate disclosures in the registration statement rests solely with the Company. In this regard, the Company should take no comfort from the fact that the staff has commented on the registration statement, and should also

understand that the staff may have further comments or recommendations after review of the material being submitted to the Commission in connection with the Ohio litigation. Please confirm this understanding by letter.

Sincerely,
/s/ HERBERT D. SCHELL
Herbert D. Schell
Branch Chief

Supreme Court, U. S.
FILED
DEC 7 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978
No. 78-759

WAYNE L. KIDWELL, Attorney General of Idaho; and TOM D. MCELDOWNEY, Director of Finance of the State of Idaho,

Appellants,

vs.

GREAT WESTERN UNITED CORPORATION,

Appellee.

On Appeal From the United States Court of Appeals for the Fifth Circuit.

Brief of Amicus Curiae State of California in Support of Appellants' Jurisdictional Statement.

EVELLE J. YOUNGER,
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IN THE

Supreme Court of the United States

October Term, 1978
No. 78-759

WAYNE L. KIDWELL, Attorney General of Idaho; and TOM D. MCELDOWNEY, Director of Finance of the State of Idaho,

Appellants,

vs.

GREAT WESTERN UNITED CORPORATION,

Appellee.

On Appeal From the United States Court of Appeals for the Fifth Circuit.

Brief of Amicus Curiae State of California in Support of Appellants' Jurisdictional Statement.

The State of California supports the request of appellants that the Court grant a hearing in this appeal from the decision of the United States Court of Appeals for the Fifth Circuit. Although California has no corporate takeover law and hence has no interest in the Fifth Circuit ruling on the merits, this State believes that the rulings of that court on the jurisdictional issues can have a substantial adverse impact on all states, and that those states which develop innovative solutions to common governmental regulatory problems will be burdened most.

Specifically, the State of California is concerned with the following questions:

"1. Whether due process or federalism principles will allow a federal court in Texas to assert personal jurisdiction over officials of the State of Idaho, one of whom took no action whatsoever and the other of whom acted solely in Idaho in his governmental capacity by enforcing Idaho law, on the theory that the official acts in Idaho had consequences or practical effects in the State of Texas.

"2. Whether a state official acting in his state solely in a governmental capacity by enforcing his own state's laws may be deemed to be 'in' or 'conducting' business in some other state for purposes of long-arm jurisdiction, state or federal, in the other state.

"3. Whether the doctrine of *Ex parte Young*, which permits suit against a state official under circumstances where the Eleventh Amendment would bar a suit against the state itself, may constitutionally be extended to subject Idaho officials acting solely within their governmental capacity in Idaho to suit in a court sited in Texas.

"4. Whether enforcement by a state official in Idaho of Idaho law which allegedly conflicts with a portion of the Securities Exchange Act of 1934 constitutes a 'violation' of said Act for purposes of federal court jurisdiction thereunder when no specific proscription thereof has been breached.

"5. Whether, in an action brought in Texas by a Texas resident against Idaho officials to invalidate an Idaho statutory scheme on the ground that it conflicts with or is preempted by the Securities Exchange Act of 1934, venue is proper in Texas either because (a) under the jurisdiction portion of the Exchange Act a 'violation' occurred in Texas or (b) under general federal venue statutes the claim against the Idaho officials arose in Texas, under a theory that the plaintiff was affected in Texas by the acts in Idaho of an Idaho official in enforcing the Idaho law."

THE QUESTIONS ARE SUBSTANTIAL.

I

The Acts of a State Official Seeking to Enforce His State's Law Within His State Is Not a Proper Subject for Litigation in a State or Federal Court Located in Another State.

As noted in Appellants' Jurisdictional Statement, neither *Ex parte Young* (1908) 209 U.S. 123 nor any case following *Young* doctrine has previously sought to extend the concept to actions brought outside the state wherein the defendant state officer holds office. *Young* attempted to balance the important constitutional principle of federalism with the equally important principle of federal judicial review of state action.

The instant decision upsets that balance. Unlike *Ex parte Young*, which simply brought the review of state action into federal court through the fiction that it was the state's officer and not the state itself which was on trial,[1] the present decision, being based upon a determination that Texas state law confers the necessary jurisdiction upon its state courts, makes it possible to compel any state to defend the constitutionality of its laws in either the state or federal courts of any other state, whenever that law has an effect on a corporation or individual located in the forum state.

[1]Even though *Ex parte Young* states that a state officer who seeks to enforce an allegedly unconstitutional state law is stripped of his official or representative character, 209 U.S. at 159-160, it is quite obvious that it is, after all, the will of the State Legislature, rather than the independent act of the state official, which has precipitated the dispute; consequently, one cannot deny that it is the state itself which is the real party in interest in such cases, regardless of the necessary semantic distinction which permits the bringing of the action in a federal court.

One of the two alternate bases for personal jurisdiction found in this case rests upon those provisions of rules 4(d)(7) and 4(e) of the Federal Rules of Civil Procedure, which measure the scope of personal jurisdiction of U.S. district courts by the scope of jurisdiction afforded to state courts by the laws of the state in which the courts are located. Accordingly, the holding extends beyond the question of federal court jurisdiction alone.

The concept of federalism involves an allocation of governmental functions between a national government and the governments of the states. Those things which must be uniform throughout the country are in the sphere of the national government, and those things which can, or should, be subject to local variations based upon local needs or preferences, are in the sphere of state government. This division of responsibility can lead to diverse approaches to common problems among the states, and this diversity often provides both the states and the federal government with an opportunity to compare the effects of the different approaches. As a practical matter, however, the mere fact of difference between the laws and practices of two states may make it more difficult for one state to defend its legislation in an attack brought in courts located in another state, where the judges in both the state and federal courts are used to a different law.

Obviously, courts do interpret the laws of other jurisdictions—when they must—and will even, on occasion, rule upon the constitutionality of the laws of other states. *State of Alaska v. Petro* (Wash. 1966) 418 P.2d 755; *Bannister v. Bannister* (Md. 1942) 29 A.2d 287; *Pacific Diamond Co. v. Superior Court* (1978)

85 Cal.App.3d 871. However, requiring a state to appear in another state to defend its laws against constitutional attack would create a substantial burden to the development of novel solutions to legislative problems.

Neither the State of California nor the appellants herein seek to reverse or erode the doctrine of *Ex parte Young;* instead, we both seek to demonstrate that a decision which purports to be only a logical extension of that doctrine is in fact a virtual abandonment of the concept of federalism.

Moreover, the decision, in determining that a state official in Idaho, acting in Idaho in a purely governmental capacity, can be "doing business" in Texas, appears to ignore the long-standing distinction between proprietary acts and governmental acts. A government, when it governs, does not "do business" anywhere. When governments enter into contracts and seek to buy or sell goods or services, they do business; when they legislate or seek to enforce regulatory legislation, governments are engaging in conduct which has never been regarded as "business."

It is not unusual for a state law to affect a foreign corporation or individual who seeks to do business in the legislating state. It is also not unusual that such state laws, when enforced with respect to the in-state activities of the foreigner, will have an impact on the foreigner's activities as a whole, because American businesses are typically not structured so that activity in each state is isolated from activity in other states. Accordingly, state regulatory law, whether or not it is incompatible with the interstate commerce clause, usually will be felt by a multistate business in places outside, as well as inside, the regulating

state, and will often require action by an officer or employee of the business who is physically located outside of the regulating state.

The instant decision suggests that if two Idaho officials had chosen to write to a Texas company proposing to undertake an activity in Idaho on the same day, each seeking compliance with a different state law, one might have established "minimum contacts" in Texas and the other might not, depending upon the nature and scope of the law being enforced. See *Great Western United Corp. v. Kidwell* (5th Cir. 1978) 577 F.2d 1256, 1269-1270, reproduced in Appellants' Jurisdictional Statement at A-22 to A-24. This distinction has the effect of making the jurisdictional determination hinge upon an analysis of the foreign statute by the court. Such an approach appears to create a substantial risk that a case will be decided on the merits as a part of the jurisdictional problem-solving process. It is submitted that it is difficult to analyze a statute to determine its regulatory effect without at the same time determining the extent to which it burdens commerce. In this regard, see the discussion in the dissenting opinion at 577 F.2d 1291-1292.

II

It Is Inappropriate to Characterize an Attempt to Enforce State Law as a Violation of a Preempting Federal Law.

The second basis of jurisdiction asserted by the Fifth Circuit Court of Appeals is that attempted enforcement of the Idaho Corporate Takeover Law is a violation of the Securities Exchange Act of 1934 merely because the Idaho law is found to have been preempted by the Securities Exchange Act. As noted above, the State

of California takes no position on the merits of this case and hence will not discuss the preemption issue. However, assuming that the Idaho law was preempted and thus not enforceable, it still appears to be inappropriate to characterize the acts of the Idaho officials as violations of federal law when the federal law includes no express prohibition for the conduct.

The instant decision treats section 28 of the 1934 Act, 15 U.S.C. § 78bb, which reserves to the states the power to regulate securities, as a prohibition of that which is not granted. Quite clearly, however, if the Idaho law is invalid by reason of conflict with any portion of the 1934 Act, it would still be invalid absent section 28; accordingly, it is sophistic to claim that section 28 is "violated" by enforcing invalid state laws.

The comparison with the profit recapture provisions for insider short-swing trading is improper; in that case, Congress has clearly intended to create a cause of action, which in turn must be brought somewhere. It is entirely proper to use the jurisdictional provisions of the Act to determine the appropriate place in such a case.

It is submitted that determinations of *in personam* jurisdiction or venue in cases involving questions of preemption of state law by federal law should normally be made without regard to jurisdictional provisions within the federal law unless Congress has expressly considered actions asserting preemption. In all other cases, jurisdiction and venue with respect to actions seeking to invalidate a state law on preemption grounds should be no different than in actions seeking to invalidate state laws on constitutional grounds. There is no rational basis for distinguishing between the two types of claim.

Conclusion.

For the foregoing reasons, amicus curiae the State of California respectfully urges that the Court note probable jurisdiction of the appeal herein.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-759

WAYNE L. KIDWELL, Attorney General of Idaho;
TOM D. McELDOWNEY, Director of the Department of Finance of the State of Idaho,
Appellants,

vs.

GREAT WESTERN UNITED CORPORATION,
Appellee.

BRIEF OF THE STATE OF INDIANA AMICUS CURIAE IN SUPPORT OF APPELLANTS

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-759

WAYNE L. KIDWELL, Attorney General of Idaho;
TOM D. McELDOWNEY, Director of the Department of Finance of the State of Idaho,
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vs.

GREAT WESTERN UNITED CORPORATION,
Appellee.

BRIEF OF THE STATE OF INDIANA AMICUS CURIAE IN SUPPORT OF APPELLANTS

The State of Indiana, by Theodore L. Sendak, Attorney General of Indiana, Donald P. Bogard, Chief Counsel, and William G. Mundy, Assistant Attorney General, submits its *amicus curiae* brief in support of the Appellants in the above-entitled cause, pursuant to Rule 42(4) of the Rules of the Supreme Court.

STATEMENT OF THE CASE

The *amicus* accepts and adopts the "Statement of the Case" contained in Appellants' Jurisdictional Statement at pages 8-12.

INTEREST OF THE AMICUS

This brief submitted *amicus curiae* by the State of Indiana will only address the issue of the jurisdiction of the federal district court in this action. Indiana believes that this case reflects an alarming tendancy on the part of federal district courts to entertain jurisdiction over any controversy, regardless of where such controversy arises. Such practice has required the State of Indiana, as the District Court below required the State of Idaho, to defend two (2) lawsuits in Texas, well beyond the confines of Indiana's borders.

In *Rodriguez v. Marshall,* Civil Action Number 73-B-130, the United States District Court for the Southern District of Texas, Brownsville Division, on December 31, 1975, dismissed Indiana officials from a pending lawsuit, but not until the State's motion had been under advisement for over two years and attorneys for Indiana had made several trips to Texas. A case entitled *Ramiro Rivera, et al. v. Ray Marshall, etc., et al.,* Civil Number B-77-115, was filed in the same court on April 26, 1977, service was made upon the Indiana officials on October 24, 1978 and the State's Motion to Dismiss is pending.

Indiana is also vitally interested in this appeal since the same reasoning embraced by the United States Court of Appeals for the Fifth Circuit (hereafter Fifth Circuit) in finding that jurisdiction existed over Idaho officials would appear to apply with equal force to Indiana officials in performing their duties under this State's takeover laws. Indiana Code §§ 23-2-3-1 *et seq.* Indeed, Indiana is one of twenty-nine states which have enacted such legislation.

With the ever increasing number of lawsuits facing state governments today, it is imperative that states' attorneys

not be compelled to defend such lawsuits all across the nation in any district court that attempts to find jurisdiction.

ARGUMENT

I.

NO PERSONAL JURISDICTION EXISTED OVER THE IDAHO STATE OFFICIALS

A.

The Fifth Circuit has Unjustifiably Expanded the Fiction Present In Ex Parte Young

The Fifth Circuit conceded that "[b]ecause this suit was brought in Texas, not Idaho, the case . . . raises novel questions of jurisdiction and venue." *Great Western United Corp. v. Kidwell,* 577 F.2d 1256, 1261 (5th Cir. 1978). It is submitted that the Fifth Circuit's responses to these novel questions were clearly erroneous.

In *Ex Parte Young,* 209 U.S. 123 (1908) this Court engaged in the fiction that since a state is incapable of authorizing an unconstitutional act, a state would have no interest in a suit alleging that a state official is acting in an unconstitutional manner. 209 U.S. at 159. By engaging in this fiction, the proscriptions of the Eleventh Amendment were avoided by stripping the official of his official character.

By expanding on this Court's reasoning in *Ex Parte Young,* the Fifth Circuit has carried the fiction to its most illogical implication:

> We read *Young* to say that a state official in enforcing an unconstitutional statute is an individual defendant and nothing more . . . 577 F.2d at 1265.

From that reasoning it would follow that a state would have no interest in defending actions of a state official alleged to be unconstitutional, in any federal forum, regardless of whether that federal forum is in the official's own state or any other state in the nation.

There comes a point when the decision in *Ex Parte Young* must be recognized for what it is—a fiction and nothing more. Obviously, Idaho, Indiana, and all other states of this Union have a strong and vital interest in preserving the constitutionality of their state's laws. This Court would do a great disservice to the States were it to blind itself to the reality of the situation as a result of a fiction which has now turned to fantasy. The necessary fiction of *Ex Parte Young* becomes totally unnecessary as utilized in the context of this action. The Appellee was certainly free to contest the validity of Idaho's takeover statute in an Idaho federal or state court. Instead, it compelled Idaho officials to go to Texas and assert their defense in a federal court there. Legal fictions should only be utilized when necessary. The *amicus* would submit that *Ex Parte Young* strips a state official of sovereign immunity for Eleventh Amendment purposes only within his own state.

B.

The Texas' Long Arm Statute Does Not Provide Personal Jurisdiction Over The Idaho State Officials

Personal jurisdiction over the Idaho officials was premised upon Federal Rules of Civil Procedure 4(d)(7) and 4(c). Those rules allow personal jurisdiction to be obtained through the long arm statute of the forum state. The Texas long arm statute, Tex. Rev. Civ. Stat. Ann. art.

2031b, § 4, authorizes assertion of personal jurisdiction over nonresidents to the limits of due process. *Jetco Electronic Industries, Inc. v. Gardiner,* 473 F.2d 1228 (5th Cir. 1973). The guidelines as offered by this Court in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), *Hanson v. Denckla,* 357 U.S. 235 (1958); *Shafter v. Heitner,* 433 U.S. 186 (1977); and *Kulko v. Superior Court of California,* — U.S. —, 98 S.Ct. 1690 (1978) as to what constitutes the limits of due process will be explored below. Generally, however, two tests have been utilized in determining whether due process permits assertion of personal jurisdiction over nonresidents: (1) the "minimum contacts" test and (2) the "fundamental fairness" test. The assumption of personal jurisdiction by the district court below over the Idaho officials failed to meet either test.

The minimum contacts necessary to confer personal jurisdiction must involve activity that shows the defendant has purposefully availed himself of the benefits and protection of the forum state's laws. *Hanson v. Denckla, supra.* In determining whether the contacts with the forum could support the inference that the nonresident defendant purposefully availed himself of the benefits of conducting business in the forum, the Fifth Circuit, in *Product Promotions, Inc. v. Cousteau,* 495 F.2d 483, 496 (5th Cir. 1974), observed that the:

> [o]perative consideration is that the defendants' contacts with the forum were deliberate, rather than fortuitous, so that the possible need to invoke the benefits and protections of the forum's laws was reasonably foreseeable, if not foreseen, rather than a surprise.

There are fewer contacts between the defendants and the State of Texas in the present case than there were

in *Hanson v. Denckla, supra,* where this Court found insufficient contacts to meet due process requirements. In noting the absence of the minimal contacts necessary to support the exercise of jurisdiction over nonresidents, this Court in *Hanson v. Denckla,* observed that the action did not arise out of an act done or transaction consumated in the forum state or to enforce an obligation that arose from a privilege the defendant exercised in the forum state. Moreover, in *Kulko v. Superior Court, supra,* this Court observed that the act in question demonstrated no intent to obtain nor expectancy of receiving a corresponding benefit in the State that would give rise to the assertion of that State's jurisdiction.

In the present case, there were no actions by the defendants that could be interpreted as an attempt to avail themselves of the benefits and protection of the forum state's law. Accordingly, as in *Hanson* and *Kulko,* there are insufficient contacts between the defendant and the forum state to meet due process requirements.

The fairness test requires that there be a rational basis between the lawsuit and the forum so that it is reasonable to require the defendant to defend the suit.

In *Oxford First Corp. v. PNC Liquidating Corp.,* 372 F.Supp. 191, 203 (E.D. Pa. 1974) the district court established guidelines in determining whether the fairness test was met:

(1) determine the extent of the defendant's contacts with the place where the action was brought,

(2) weigh the inconvenience to the defendant of having to defend in a jurisdiction other than that of his residence or place of business,

(3) consider judicial economy,

(4) consider the probable situs of discovery proceedings,

(5) examine the impact of the defendant's activities beyond his borders.

In the present case, consideration of the first four factors as listed above would indicate that Texas had no personal jurisdiction over the defendants. The defendants conducted no activities in Texas, so there were no direct contacts with the place where the action was brought. There was considerable inconvenience to the defendant in being required to defend in Texas—quite a distance from the defendant's official residence. Likewise, the state officials from Idaho were not involved in any type of interstate business, and because of the nature of their official duties, it was most inconvenient to require them to defend the suit in a distant forum. Since the suit involved the constitutionality of Idaho's statute, it is obvious that the situs of discovery proceedings should not be in Texas.

In considering the fifth factor, *i.e.,* the impact of the defendant's activities beyond his border, it should be noted that the only impact was the effect of the regulation that Great Western felt in Texas, which was brought about solely by Great Western's willful refusal to comply with Idaho law. As Justice Godbald points out in his dissenting opinion, this Court decided in *Kulko, supra,* that jurisdiction based solely upon a causal effect in a state was unreasonable where the action arose from neither the defendant's causing physical injury in the state nor his commercial transactions in interstate commerce. 577 F.2d, at 1289.

The fairness test has a subjective quality in that it requires the contacts between the defendant and the forum to be of such quality that it is reasonable to expect the

defendant to defend the suit in the forum state. That assumption does not rationally follow in this case. The slight effect of the Idaho statute in Texas is not sufficient activity to subject Idaho officials to personal jurisdiction in this cause of action under either the minimum contacts or the fairness standard.

The possible long-range effects of the decision by the Fifth Circuit are staggering. If the decision were followed to its logical conclusion, a state could be forced to defend a lawsuit in any district court in the country where a plaintiff attempts to find jurisdiction. The resulting drain upon state treasuries and the practical burdens upon state personnel as a result of defending actions in far removed forums should be given this Court's fullest consideration. It is not only inconvenient, but unreasonable to expect a state to defend its laws anywhere in the nation.

CONCLUSION

For the foregoing reasons, the *Amicus,* State of Indiana respectfully urges that this Court note probable jurisdiction.

Respectfully submitted,

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Supreme Court, U. S.
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JOINT APPENDIX

In the Supreme Court

OF THE

United States

OCTOBER TERM 1978

No. 78-759

DAVID H. LEROY, Attorney General of Idaho,
and TOM D. MCELDOWNEY,
Director of the Department of Finance
of the State of Idaho,
Appellants,

vs.

GREAT WESTERN UNITED CORPORATION,
Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

Jurisdictional Statement Filed November 7, 1978
Probable Jurisdiction noted January 8, 1979

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Mar. 28, 1977—Plaintiff Great Western United Corp. filed its complaint with attached exhibits in the United States District Court for the Northern District of Texas, Dallas Division.

Mar. 28, 1977—Summons was issued individually and through the Texas Secretary of State.

Mar. 28, 1977—Plaintiff's order to show cause that the defendants are to appear on Mar. 30, 1977, at 9:00 A.M., filed.

Mar. 29, 1977—Return on summons serving all defendants through Texas Secretary of State filed.

Mar. 30, 1977—Special appearance and motions to dismiss filed by defendant Idaho officials, Kidwell and McEldowney, filed.

Mar. 30, 1977—Return on summons serving personally defendant Maryland officials, Burch and Polovoy, and New York official, Lefkowitz, filed.

Mar. 31, 1977—Temporary restraining order as to all defendants operative until and pending a hearing set April 8, 1977, at 9:00 A.M., filed.

Mar. 31, 1977—Notice of appeal by defendant Maryland officials, Burch and Polovoy, and Idaho officials, Kidwell and McEldowney, filed.

Apr. 6, 1977—Return on summons serving personally defendant Idaho officials, Kidwell and McEldowney, filed.

Apr. 8, 1977—Order from United States Court of Appeals for the Fifth Circuit staying the district court's order of Mar. 31, 1977, pending a hearing before that court on the issues of jurisdiction and venue, with written findings of fact and conclusions of law thereon, prior to consideration of the merits, filed.

Apr. 8, 1977—Defendant Maryland officials, Burch and Polovoy, answer filed.

Apr. 21, 1977—Findings of fact and conclusions of law on jurisdiction and venue issues filed.

May 5, 1977—Order dismissing complaint against defendant Maryland officials, Burch and Polovoy, filed.

May 5, 1977—Order, pursuant to Rule 65(a)(2), F.R.C.P., setting consolidated hearing on application for preliminary injunction with trial of the action on its merits on May 23, 1977, at 9:00 A.M., filed.

May 23, 1977—Defendant Idaho officials, Kidwell and McEldowney, answer filed.

May 23, 1977—Trial of action to the court commenced.

May 24, 1977—Defendant New York official, Lefkowitz, answer filed.

Sep. 2, 1977—Memorandum opinion granting to plaintiff a declaratory judgment and injunctive relief against Defendant Idaho officials, Kidwell and McEldowney, and dismissing the complaint against Defendant New York official, Lefkowitz, filed.

Sep. 6, 1977—Judgment reflecting recitals of memorandum opinion and reiterating dismissals of Defendant New York and Maryland officials filed.

Sep. 7, 1977—Defendant Idaho official, McEldowney, notice of appeal from final judgment and permanent injunction filed.

Sep. 8, 1977—Defendant Idaho official, McEldowney, appeal to the United States Court of Appeals for the Fifth Circuit docketed.

Aug. 10, 1978—Opinion and judgment of United States Court of Appeals for the Fifth Circuit, affirming district court judgment, filed.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1978

No. 78-759

DAVID H. LEROY, Attorney General of Idaho,
and TOM D. MCELDOWNEY,
Director of the Department of Finance
of the State of Idaho,
Appellants,

vs.

GREAT WESTERN UNITED CORPORATION,
Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

Jurisdictional Statement Filed November 7, 1978
Probable Jurisdiction noted January 8, 1979

In the United States District Court
for the Northern District of Texas
Dallas Division

Civil Action No. DA 3-77-0405

Great Western United Corporation,
Plaintiff

vs.

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Attorney General of Idaho
700 West State Street Statehouse
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and

Tom D. McEldowney
Director of the Idaho Department of Finance
700 West State Street Statehouse
Boise, Idaho 83720

and

Louis J. Lefkowitz
Attorney General of New York
New York Department of Law
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New York, New York 10047

and

Francis B. Burch
Attorney General of Maryland
One South Calvert Street
Baltimore, Maryland 21202

and

Norman Polovoy
Commissioner of Securities
Maryland Division of Securities
One South Calvert Street
Baltimore, Maryland 21202,
Defendants

[Filed Mar. 28, 1977]

COMPLAINT

The Plaintiff, GREAT WESTERN UNITED CORPORATION ("GWU"), alleges as follows:

1. This is an action for a declaratory judgment, pursuant to 28 U.S.C. § 2201, seeking to declare that the provisions of § 30-1501, *et seq.* of the Idaho Code ("Idaho Act"), the provisions of § 11-901, *et seq.* of the Annotated Code of Maryland ("Maryland Act") and the provisions of § 1600, *et seq.* of the New York Business Corporation Law ("New York Act") (collectively, the "State Takeover Acts"), insofar as they purport to apply to an interstate cash tender offer for the purchase of securities traded on a national securities market, (a) represent an unconstitutional burden on interstate commerce in violation of the commerce clause of the United States Constitution (the "Constitution"); (b) intrude unwarrantedly into an area pre-empted by federal regulation, in contravention of the Supremacy Clause of the Constitution; (c) deny rights to equal protection of the law and to due process guaranteed by the Fourteenth Amendment to the Constitution; and (d) deprive civil rights guaranteed by the Constitution and the Civil Rights Act. A temporary restraining order, temporary injunction and permanent injunction are also sought to redress these wrongs by restraining the operation and enforcement of the State Takeover Acts in connection with GWU's proposed tender offer, all on the grounds set forth above.

JURISDICTION AND VENUE

2. Original jurisdiction of this Court is founded upon:

(a) 28 U.S.C. § 1331 in that this is a civil action wherein the matter in controversy exceeds the sum or value of Ten Thousand ($10,000) Dollars, exclusive of interest and costs, and arises under the laws and Constitution of the United States, including the Securities Exchange Act of 1934 and amendments thereto, 15 U.S.C. §§ 78(a) *et seq.*; the Civil Rights Act of 1871, 42 U.S.C. § 1983; Article I § 8 of the Constitution (the "Commerce Clause"); Article VI of the Constitution (the "Supremacy Clause"); and the Fourteenth Amendment to the United States Constitution.

(b) 28 U.S.C. § 1332 in that this is a civil action wherein the matter in controversy exceeds the sum or value of Ten Thousand Dollars ($10,000), exclusive of interest and costs, and is between citizens of different States.

(c) 28 U.S.C. § 1337 in that this is a civil action arising under Acts of Congress regulating commerce or protecting trade and commerce against restraints and monopolies, namely the Securities Exchange Act of 1934 and amendments thereto, 15 U.S.C. §§ 78(a) *et seq.* and the Civil Rights Act of 1871, 42 U.S.C. § 1983.

(d) 28 U.S.C. § 1343(3) and (4) in that this is a civil action seeking redress through declaratory judgment and equitable relief of rights, privileges and

immunities secured by the Constitution and the Civil Rights Act of 1871, 42 U.S.C. § 1983.

(e) 15 U.S.C. Section 78aa (§ 27 of the Securities Exchange Act of 1934) in that this is a civil action claiming the violation of the securities laws of the United States by the enforcement, actual and threatened, of the State Takeover Acts.

3. This Court has personal jurisdiction over all of the Defendants herein under:

(a) Section 27 of the Securities and Exchange Act of 1934 in that Defendants or their duly authorized agents have performed acts within the State of Texas constituting, in whole or in part, the violation of the Federal Securities Laws hereinafter alleged and the transaction of business within the State of Texas.

(b) Article 2031b Tex. Rev. Civ. Stat., each of the Defendants being a non-resident natural person who engages in business in this state, as more specifically hereinafter alleged, but does not maintain a place of regular business in this state or a designated agent upon whom service may be made upon causes of action arising out of such business done in this state and who has, accordingly, been deemed to appoint the Secretary of State of Texas as agent upon whom service of process may be made in this action.

4. Venue is proper in this District pursuant to the provisions of 28 U.S.C. § 1391(b) in that the claims which

are the subject of this Complaint arose in this judicial district and the acts and transactions constituting violations of GWU's rights under the laws and the Constitution have occurred in this judicial district. Alternatively, venue is proper in this judicial district pursuant to the provisions of 28 U.S.C. § 1391(a) in that GWU resides in this judicial district, and the claims which are the subject of this Complaint arose in this judicial district and the acts and transactions constituting violations of GWU's rights under the laws and the Constitution have occurred in this judicial district. Alternatively, venue is proper in this judicial district pursuant to the provisions of Section 27 of the Securities and Exchange Act of 1934, in that acts constituting the violation of Federal Securities Laws have occurred in the State of Texas and Defendants herein transact business in this state.

THE PARTIES AND BACKGROUND

5. GWU is a publicly owned corporation organized and existing under the laws of the State of Delaware with its executive office in Dallas, Texas. GWU is the owner of 335,070 shares of Common Stock, par value $.05 per share (the "Shares"), of Sunshine Mining Company, a Washington corporation ("Sunshine"), which has its principal executive offices at P.O. Box 1080, Kellogg, Idaho 83837.

6. The Chairman of the Board of Directors, the President and Chairman of the Executive Committee, the Executive Vice President, the Vice President and Treasurer and the Controller of GWU are all residents of Dallas County, Texas. All of the members of the Board of Direc-

tors of GWU are residents of Dallas County, Texas. Residents of Dallas County, Texas own in excess of 65% of the outstanding common stock of GWU, and GWU has other Texas shareholders.

7. On March 21, 1977, GWU announced that it intended to make a tender offer to purchase any and all Shares of Sunshine up to 2,000,000 shares (in addition to the 335,070 Shares of Sunshine already owned by GWU) at a net price of $15.75 per share in cash, subject to the terms and condition set forth in a proposed form of an Offer to Purchase and related Letter of Transmittal filed by GWU with the Securities and Exchange Commission (the "Commission") pursuant to 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (the "Williams Act"). GWU is complying with and will continue to comply with all provisions and requirements of the Williams Act dealing with cash tender offers.

8. Defendant, Wayne L. Kidwell, is a citizen of the State of Idaho and is the Attorney General of the State of Idaho.

9. Defendant, Tom D. McEldowney, is a citizen of the State of Idaho and is the Director of the Idaho Department of Finance.

10. The State of Idaho, under the Idaho Act, has purported to grant to Defendant, Tom D. McEldowney, or upon his reference, to Defendant, Wayne L. Kidwell, the right to administer and enforce compliance with the Idaho Act.

11. Defendant, Louis J. Lefkowitz, is a citizen of the State of New York and is the Attorney General of the State of New York.

12. The State of New York, under the New York Act, has purported to grant to Defendant, Louis J. Lefkowitz, the right to administer and enforce the New York Act.

13. Defendant, Francis B. Burch, is a citizen of the State of Maryland and is the Attorney General of the State of Maryland.

14. Defendant, Norman Polovoy, is a citizen of the State of Maryland and is the Commissioner of Securities of the Maryland Division of Securities.

15. The State of Maryland, under the Maryland Act and Section 11-701, *et seq.* of the Annotated Code of Maryland, has purported to give Defendant, Norman Polovoy, the right to administer and enforce compliance with the Maryland Act, and to give to Defendant, Francis B. Burch, the right to institute criminal proceedings under the Maryland Act, with or without a reference from Defendant, Norman Polovoy.

16. The Shares of Sunshine are listed and traded on the New York Stock Exchange and the Spokane Stock Exchange. The following table sets forth the high and low sales prices per share for the periods indicated, as reported in published financial sources (as adjusted for 2% stock dividends in March, 1974 and December, 1976); all prices are New York Stock Exchange sales prices, except that prices commencing January 26, 1976, are shown as Composite Tape transmissions:

Year and Quarter	High	Low
1974		
First Quarter	$24¾	$15½
Second Quarter	20⅛	12⅞
Third Quarter	17⅝	7⅛
Fourth Quarter	13⅛	8½
1975		
First Quarter	14¾	9
Second Quarter	15¾	10¼
Third Quarter	16½	11⅜
Fourth Quarter	12¾	9¼
1976		
First Quarter	13⅛	9¾
Second Quarter	12¾	10½
Third Quarter	12¾	9¾
Fourth Quarter	12½	9½
1977		
First Quarter (through March 17, 1977)	14½	11

The New York Stock Exchange Composite Tape closing price on March 17, 1976, the last trading day prior to public announcement of GWU's intention to make the cash tender offer, was $14.25.

THE WILLIAMS ACT

17. In 1968, Congress enacted certain amendments to the Securities Exchange Act of 1934 to regulate cash tender offers for the securities of corporations registered under Section 12 of that Act. Sunshine is registered under Section 12 of that Act.

18. The Williams Act established a uniform national system of regulation of interstate cash tender offers, administered by a single Federal Agency, the Commission. In enacting the Williams Act, Congress recognized that cash tender offers serve a legitimate and beneficial economic function, providing investors with an effective method of replacing inefficient but entrenched management and, also, with an opportunity to sell their shares at a price in excess of the prevailing market price. The Williams Act reflects the intent of Congress not to defeat or discourage cash tender offers.

19. The Williams Act is designed to establish even-handed regulation, favoring neither the tender offeror nor incumbent management of the target corporation, but assuring that investors are provided with certain material information in connection with the tender offer to enable them to render an informed investment judgment as to whether to hold, sell or tender their securities.

STATE TAKEOVER ACTS MATERIALLY CONFLICT WITH EACH OTHER AND WITH THE WILLIAMS ACT

20. Attached hereto as Exhibit "A" and made a part hereof is a chart which demonstrates certain of the material conflicts among the State Takeover Acts themselves, as well as conflicts with the Williams Act. Section 28 of the Securities Exchange Act of 1934, of which the Williams Act is a part, tolerates the jurisdiction of a state securities commission, or like agency, only insofar as their is no conflict with that Act or the rules and regulations thereunder.

IDAHO ADMINISTRATIVE PROCEEDINGS

21. Although not legally required to do so, but in a spirit of cooperation, GWU, on March 21, 1977, delivered an application for registration under the Idaho Act. On March 25, 1977, Defendant, Tom D. McEldowney, responded by telecopied letter as set forth on Exhibit "B" attached hereto and made a part hereof. The demands made in such letter are unreasonable, unnecessary and violative of the federal scheme of regulation under the Williams Act.

22. On March 25, 1977, Defendant, Tom D. McEldowney, with no notice to GWU and without hearing, so far as is known to GWU, issued an "Order" that certain material information had been found to be lacking in the application for registration and proposed form of Offer to Purchase filed under the Idaho Act by GWU, and "ordered" that the effective date of the offer be delayed. A copy of said ex parte "Order" is attached hereto and made a part hereof as Exhibit "C".

23. The Idaho "Order" requires GWU, as a prerequisite to making its proposed cash tender offer, to alter the terms of that offer, in ways which are unreasonable, unnecessary, impossible, or involve a risk of violating the Williams Act, and presage further delay and the burden and expense of additional Idaho administrative procedures in which incumbent management of the Company will undoubtedly participate, all without any assurance that the offer will ever be permitted to be made under the Idaho Act.

MARYLAND ADMINISTRATIVE PROCEEDINGS

24. Although not legally required to do so, but in a spirit of cooperation, representatives of GWU met with Defendant, Norman Polovoy, on March 21, 1977, in an effort to demonstrate that the Maryland Act was inapplicable in any event for the reason that Sunshine does not have its primary place of business or a substantial portion of its assets in Maryland. On information and belief, Defendant, Norman Polovoy thereafter contacted or was contacted by representatives of incumbent management of Sunshine, and thereafter advised GWU counsel that the Maryland Defendants would call a hearing in order to determine applicability of the Maryland Act.

NEW YORK ADMINISTRATIVE PROCEEDINGS

25. Although not legally required to do so, but in a spirit of cooperation, representatives of GWU met with representatives of Defendant, Louis J. Lefkowitz, on March 21, 1977, in an effort to demonstrate that the New York Act was inapplicable in any event for the reason that Sunshine does not have its principal place of business and substantial assets within New York. Representatives of Defendant, Louis J. Lefkowitz, thereafter advised representatives of GWU that the New York Defendant was also asserting jurisdiction over GWU's proposed cash tender offer.

IRREPARABLE INJURY

26. The enforcement of the State Takeover Acts and the Idaho "Order", is causing and, unless enjoined, will continue to cause immediate, serious and irreparable injury, both to GWU and its shareholders, which injury is not capable of

exact calculation and for which there is no adequate remedy of law, in that GWU will be deprived of its right under the Williams Act to make its proposed cash tender offer at a premium above the market price to shareholders of Sunshine throughout the country.

27. The very existence of the State Takeover Acts and the Idaho "Order", has had and, unless enjoined, will continue to have a chilling effect upon the exercise of rights of prospective tender offerors throughout the country to make interstate cash tender offers to shareholders throughout the country for the purpose of securities of corporations traded on national securities markets, in violation of the Constitution and the Williams Act.

28. The enforcement of the State Takeover Acts and the Idaho "Order", has already inflicted serious injury on GWU, GWU's shareholders, and shareholders of Sunshine. GWU's compliance with the State Takeover Acts will result in unnecessary, unreasonable and indefinite delay of GWU's proposed cash tender offer, as well as the expenditure of substantial time, money and effort by GWU and its representatives. GWU's inability to make its cash tender offer at the time of its choosing, the consequent delay in the making of the offer and the nature of the conditions already imposed upon the offer by the Idaho "Order" and undoubtedly to be imposed upon the offer by state officials seeking to enforce the New York Act and the Maryland Act have and will continue to seriously jeopardize the making of the offer and, if ultimately made, its prospects for success. Absent prompt and decisive action by this Court enjoining the enforcement here of the State Takeover Acts and the Idaho

"Order", the proposed tender offer may never be made and thus, GWU, GWU's shareholders and shareholders of Sunshine will be irreparably injured. GWU has no adequate remedy at law.

29. Existing and continued action under color of state law by Defendants is depriving and will deprive GWU of the rights, privileges and immunities secured by the Supremacy Clause and Commerce Clause of the Constitution, the right of due process and equal protection under the law afforded by the Fourteenth Amendment thereto, and 42 U.S.C. § 1983.

30. The reasonably foreseeable, contemplated and intended consequences caused by Defendants' actions and threatened action as hereinabove set forth will be an adverse impact and restraint on the commerce of the State of Texas. Material economic injury to GWU and other citizens of the State of Texas will arise from said actions.

CLAIMS FOR RELIEF

31. GWU repeats and realleges the allegations of Paragraphs 5 through 30 above.

32. The operation and enforcement by Defendants of the State Takeover Acts expose GWU to:

(a) multiplicity of conflicting regulatory schemes, pre-filing and filing requirements, hearings and litigation;

(b) incalculable expense and undue delay;

(c) administrative orders issued without notice or hearing, as exemplified by the Idaho "Order";

(d) a violation of one State Takeover Act by compliance with another;

(e) inconsistent results from State to State;

(f) violation of the Williams Act by compliance with conflicting State law;

(g) asserted extra-territorial application of each State Takeover Act, even if no shareholders of Sunshine reside in Idaho, New York or Maryland, where, in any event, the interest of shareholders in connection with tender offers for their securities are fully and adequately protected by the extensive provisions of the Williams Act, other provisions of the Federal Securities Laws, the rules and regulations promulgated pursuant thereto, and the existing "Blue Sky" laws of the States in which such shareholders reside; and

(h) three regulatory schemes so one-sided and pro-management (rather than pro-shareholder) that only incumbent management of Sunshine can elect not to have the provisions of the State Takeover Acts apply.

The Congressional encouragement of tender offers is totally frustrated. The uniformity of regulation under the Williams Act is rendered impossible. By reason of the foregoing, the State Takeover Acts, on their face and as applied, impose a direct, substantial and unreasonable burden upon interstate commerce in violation of the Commerce Clause of the Constitution, a violation of GWU's civil rights, and a denial to GWU of the equal protection rights under the law and the right of due process of law under the Fourteenth Amendment to the Constitution.

33. GWU repeats and realleges the allegations of Paragraphs 5 through 30 and 32 above.

34. The State Takeover Acts, on their face and as applied, are:

(a) incompatible with the dominant Federal interest in, and uniform Federal regulation of, interstate cash tender offers and contravene the purpose, spirit and provisions of the Williams Act and the rules and regulations promulgated pursuant thereto;

(b) tip in favor of incumbent management the delicate balance of regulation, favoring neither the tender offeror nor incumbent management, carefully established by Congress in the Williams Act and maintained by the Commission in its rules and regulations pursuant thereto;

(c) provide, contrary to the Federal regulatory scheme, benefits to incumbent management and prejudice to the offeror;

(d) restrict the conduct of the offeror before and during the tender offer, but not the conduct of incumbent management;

(e) require an offeror to announce its intention to make a tender offer and to file information in advance of making the offer, despite the fact that Congress expressly rejected such a requirement in enacting the Williams Act;

(f) require disclosure by an offeror of burdensome and unnecessary information without requiring equiva-

lent disclosure by incumbent management in opposition to the tender offer;

(g) permit incumbent management or the Defendants to delay and defeat a tender offer by subjecting the offeror, before making the offer, or during the making of an offer, to lengthy and burdensome hearings, not required or permitted by the Federal regulatory scheme;

(h) prevent a tender offer from being made to any shareholder anywhere in the country unless and until incumbent management or Defendants approve the offer; prohibit or impede the making of a tender offer permissible under the Federal regulatory scheme; make possible simultaneous but inconsistent regulation of a tender offer by different States; alter the duration, proration and withdrawal provisions of a tender offer as prescribed by Federal law, rules and regulations, and require disclosure of information by the offeror in a form and manner in violation of the Federal regulatory scheme; and

(i) impose conditions on the making of a tender offer which are impossible to fulfill and, thus, preclude the making of the offer, in contravention of the Federal regulatory scheme.

By reason of the foregoing, the State Takeover Acts, on their face and as applied, are pre-empted by Federal law, are in conflict with the Federal regulatory scheme, contravene Section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), and violate the Supremacy Clause of the Constitution.

WHEREFORE, GWU prays that:

A. This Court declare that the State Takeover Acts are unconstitutional and null and void as applied to GWU's interstate cash tender offer for Sunshine Shares.

B. This Court order that Defendants, their successors in office, their agents, servants, employees and attorneys, and all persons in active concert or participation with them, be temporarily, preliminarily and permanently enjoined from taking any action to enforce the State Takeover Acts or any other provision of State law incorporated by reference therein, or any other orders, rules or regulations issued pursuant thereto, as against GWU or those acting in its behalf, in connection with GWU's interstate cash tender offer for Sunshine Shares.

C. GWU have such other and further relief as the Court shall deemed necessary and proper.

Ivan Irwin, Jr.
A.B. Conant, Jr.
James V. Grevelle
James Wm. Moore

/s/ A.B. CONANT, JR.
2827 First National Bank Building
Dallas, Texas 75202
(214) 748-9696

OF COUNSEL:
SHANK, IRWIN, CONANT, WILLIAMSON & GREVELLE

STATE OF TEXAS
COUNTY OF DALLAS

G. MICHAEL BOSWELL, being duly sworn, deposes and says that he is the Executive Vice President of GREAT WESTERN UNITED CORPORATION, the Plaintiff herein; that he has read the foregoing Complaint and knows the contents thereof and that the same are true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

/s/ G. MICHAEL BOSWELL

SUBSCRIBED AND SWORN to before me this 27th day of March, 1977.

/s/ DIANNA FOX
Notary Public in and for
Dallas County, Texas

MATERIAL CONFLICTS ANALYSIS*

Item:	Williams Act	Idaho Act	Maryland Act	New York Act
1. Definition of "Target Company."	Any issuer with a class of equity securities registered under the Securities Exchange Act of 1934. § 14(d)(1).	A corporation or other issuer of securities which is organized under the laws of the State of Idaho or has its principal office in the state, which has substantial assets located in the state, whose equity securities of any class are or have been registered under Chapter 14, Title 30, Idaho Code, or predecessor laws or § 12 of the Securities Exchange Act of 1934, and which is or may be involved in a takeover offer relating to any class of its equity securities. § 30-1501(6).	A corporation or other issuer of securities whose equity securities are or are to be the subject of a takeover offer and which (1) is organized under the laws of the State of Maryland, or (2) has its primary place of business or a substantial portion of its assets in the state. § 11-901(i).	A corporation whose securities are or are to be the subject of a takeover bid and is either organized under the laws of the State of New York or has its principal place of business *and* substantial assets within the State of New York. § 1601(a) and (e).
2. Waiting period.	None (Rejected by Congress)	No specific number of days, but a registration statement must be declared effective by the director of the department of finance before the offer may commence. In addition, he may by order summarily delay	Automatic 20-day waiting period after the date of filing of a registration statement. § 11-902.	Automatic 20-day waiting period after the date of filing of a registration statement. § 1602.

*Reference is here made to complete text of laws under consideration; the information to follow is only a summary of certain points.

[Exhibit A to Complaint]

Item:	Williams Act	Idaho Act	Maryland Act	New York Act
		the effective date of the offer if he determines that the registration statement does not contain all of the specified information or does not provide full disclosure to offerees of all material information concerning the offer. § 30-1503(3) and (4).		
3. Information required in filings.	(1) The background and identity of all persons by whom or on whose behalf the purchases have been or are to be effected; (2) The source and amount of the funds or other consideration used or to be used in making the purchases, and information on funds borrowed for the purchase price. (3) If the purpose of the offer is to acquire control, any plans or proposals to liquidate, to sell assets, to merge, or to make any other major change.	Substantially the same information required by the Williams Act, *plus* the following: (1) material information concerning the organization and operations of any offeror which is a corporation, including the year, form and jurisdiction of its organization, (2) a description of each class of its stock and long-term debt, (3) a description of the business done by the offeror and its subsidiaries and any material changes therein during the past 3 years,	Substantially the same information required by the Williams Act, *plus* the following: (1) The number of shares to be purchased, (2) The duration of the offer, (3) Whether the offeror will unconditionally accept all or any part of the shares tendered,	Substantially the same information required by the Williams Act, *plus* the following: (1) Complete information on the organization and operations of the offeror, including without limitation the year of organization, form of organization, jurisdiction in which it is organized, (2) a description of each class of the offeror's capital stock and of its long-term debt, (3) financial statements for the current period and for the 3 most recent annual accounting periods,
	(4) Shares owned and acquirable; and	(4) a description of the location and character of the principal properties of the offeror and its subsidiaries,	(4) The conditions upon which acceptance will be made,	(4) a description of pending legal proceedings other than routine litigation to which the offeror or any of its subsidiaries is a party or of which any of their properties is subject,
	(5) Detailed information as to contracts, arrangements, or understandings with any person with respect to any securities of the issuer. § 13(d)(1).	(5) a description of any material pending legal or administrative proceedings in which the offeror or any of its subsidiaries is a party, (6) the names of all directors and executive officers of the offeror and their material business activities and affiliations during the past 3 years, (7) financial statements of the offeror for its 3 most recent annual accounting periods and any current period, and (8) any other documents, exhibits and information that the director deems material to the takeover offer. § 30-1503.	(5) The other contractual terms of the offer. § 11-902.	(5) a brief description of the business done by the offeror and its subsidiaries and the general development of such business over the past 5 years, (6) the names of all directors and executive officers together with biographical summaries of each for the preceding 3 years and (7) such other and further exhibits, data and documents, as may be required by the Attorney General. § 1603.
4. Publication.	None. (However, publication of definitive offer needed if shareholder	The statute *requires* public disclosure of the material terms of the	An offeror *may* subsequent to filing publish a notice of intention to	No comparable provision.

Item:	Williams Act	Idaho Act	Maryland Act	New York Act
	list unavailable).	proposed offer not later than the date of filing of the registration statement. § 30-1503. The advertisement required by the regulations is to state the following information: (1) The name of the offeror, (2) The name of the target company, (3) The class of security for which a takeover offer is intended to be made, (4) The amount and nature of the consideration, including cash, stock, or other securities or property to be used by the offeror to acquire tendered shares of the target company. (5) If the consideration is to be a security and if there is a public market for such security, the name of the principal national securities exchange or other market where the price of the	make a takeover offer containing a full and fair summary of the information required to be filed. § 11-902(c). The notice of intention must contain a legend, prominently displayed on the notice, stating that an offer may not be made, and tenders are not being and may not be solicitated, until the expiration of a twenty-day waiting period, and specifying the date on which offers may first be made. § 11-902(c).	

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		security is quoted and the last reported price at the close of trading on a business day not more than three (3) days prior to the date when public disclosure is made, (6) The date of filing of the registration statement with the director, and (7) The following statement in bold-faced type: "THIS PUBLICATION OF A PROPOSED TENDER OFFER OR INVITATION FOR TENDERS IS REQUIRED BY THE IDAHO CORPORATE TAKE-OVER LAW AND DOES NOT CONSTITUTE AN OFFER NOR A SOLICITATION FOR AN OFFER. NO OFFER MAY BE MADE, NOR WILL TENDERS BE ACCEPTED, UNLESS AND UNTIL THE REGISTRATION STATEMENT WITH RESPECT TO THE OFFER BECOMES EFFECTIVE WITH THE DIRECTOR OF		

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Item:	Williams Act	Idaho Act	Maryland Act	New York Act
		FINANCE." *Regulations*, "Definitions (6)". The director may permit the omission of any of the above information or the inclusion of additional information in a public disclosure.		
5. Advance administrative review.	None.	(a) A takeover offer becomes effective only when approved by the director of the department of finance who may call a hearing if he deems it necessary or appropriate and *shall* call a hearing for the protection of offerees in Idaho if requested by the target company acting through its board of directors. If a hearing is called, the offer shall not become effective until registered by order of the director. Any hearing called by the director shall be held within 20 days of the date of filing and any determination must be made following the hearing within 30 days after the date of such filing, unless extended by order of the director. Following the hearing, if the director finds that the takeover offer fails to provide for full disclosure to offerees of all material information concerning the offer or will not be made to all stockholders on substantially equal terms or is in violation of the Idaho blue sky law, he shall by order deny registration of the offer. § 30-150,	(a) The securities commissioner has the power to make public or private investigations concerning violations or enforcement of the statute, and may seek court injunctions for violations or potential violations of the statute. §§ 11-701, 11-702 and 11-906.	(a) The Attorney General of the State of New York may within 15 days of the filing of the registration statement, schedule a public hearing or conduct such investigation as he deems necessary concerning the proposed offer for the purpose of determining compliance with the requirements of the statute and whether the offer provides full and fair disclosure to offerees of all material information concerning the offer including the filing of a complete and accurate registration statement. Any initial hearings shall commence within 40 days of the filing of the registration statement. § 1604. Within 30 days of such hearing or investigation, the Attorney General shall determine whether the requirements of the statute have been met. If he so finds, he shall enter an order authorizing the making or continuation of the offer. If he finds to the contrary, he shall enter an order prohibiting the making or continuation of the offer until such time as full compliance has been accomplished. § 1605.
		(The director takes the position that "filing" is complete and "filed" only after the offeror has incorporated all of the director's comments into the offering material.)		
		(b) No advance administrative review of target company's material.	(b) Same as Idaho.	(b) Same as Idaho.
6. Filing requirements of incumbent management.	Any solicitation or recommendation to security holders to accept or reject the tender offer must be made in accordance with rules prescribed by the SEC. § 14(d)(4). The regulations require that an information statement on Schedule 14D must be	Same as Maryland. In addition, the director by rule or order may prohibit the use of any solicitation materials deemed false or misleading. § 30-1504.	No advance filing requirement. Copies of all materials used by the target company must be filed with the commissioner not later than the time they are first used and are subject to general anti-fraud provisions. § 11-903.	Substantially the same as Maryland. Regulations, §§ 12.10.

Item:	Williams Act	Idaho Act	Maryland Act	New York Act
	filed with the SEC prior to taking any such action. Regulation 14d-4. The information required by the Schedule 14D includes the following: (1) The title and class of the securities in question and the name and address of the issuer. (2) An identification of the tender offer and a statement of the reasons for the solicitation or recommendation to security holders to accept or reject the offer. (3) The name and business address of the person filing the statement. (4) A description of any arrangement or understanding in regard to the solicitation with (i) the issuer or the management of the issuer or (ii) the offeror. (5) Identification of any person or class of persons employed, retained or to be compensated to make			

	solicitations or recommendations to security holders and a brief description of the terms of such employment, retainer or arrangement for compensation. (6) A copy of all solicitations or recommendations to accept or reject the tender offer. (7) Information as to all transactions in the securities which are the subject of the tender offer which were effected during the past 60 days by the issuer and its subsidiaries and their officers, directors, and affiliated persons. Any written solicitation or recommendation to security holders must include the name of the person making the solicitation or recommendation and the information required by items 2 and 4 above or a fair and adequate summary thereof. Regulation 14d-4.			

Item:	Williams Act	Idaho Act	Maryland Act	New York Act
7. Exemption from regulation if offer is recommended by incumbent management.	None.	Takeover offer does not include an offer as to which the target company, acting through its Board of Directors, recommends acceptance to its stockholders, if the offer is made to all stockholders on substantially equal terms. § 30-1501(5)(e).	Same as Idaho, if any inducements to officers and directors of the company are disclosed to all offerees at the time the takeover is made. § 11-901(h)(2)(v).	Substantially the same as Maryland. § 1601(b)(5).
8. Extra-territorial effect of statute.	At least nationwide.	At least nationwide. Offers must be made to all Idaho stockholders on substantially the same terms made to non-Idaho stockholders. § 30-1506	Same as Idaho. § 11-905(a).	Substantially the same as Idaho by regulation. Regulations, § 12.4(b) and (f).

NOTE: Exhibits "B" and "C" to Complaint reproduced elsewhere in this Appendix as Plaintiff's Exhibits 4 and 5, respectively.

In the United States District Court
for the Northern District of Texas
Dallas Division

Civil Action No. CA 3-77-0405-D

[Title Omitted in Printing]

[Filed May 23, 1977]

ANSWER OF IDAHO DEFENDANTS

Defendants Wayne L. Kidwell, Attorney General, State of Idaho, and Tom D. McEldowney, Director, Department of Finance, State of Idaho, answer the Complaint as follows:

First Defense

This Court lacks jurisdiction over the subject matter of this action.

Second Defense

This Court lacks jurisdiction over the person of the defendants.

Third Defense

Venue is not proper in this judicial district.

Fourth Defense

There is insufficiency of process.

Fifth Defense

The Complaint fails to state a claim against defendants upon which relief can be granted.

Sixth Defense

Plaintiff waived its right to challenge the constitutional validity of the Idaho statute as applied to the proposed tender offer which is the subject of the Complaint, by expressly stating in the proposed offer that compliance with the statute was a condition thereof, by announcing and stating in its filing with the Securities and Exchange Commission its intent to comply with the statute, and by its filing in Idaho.

Seventh Defense

1. Admit that plaintiff seeks relief as alleged, and deny all other allegations in Paragraph 1 of the Complaint.

2. Deny the allegations in Paragraphs 2, 3 and 4 of the Complaint.

3. Deny the allegations in Paragraphs 5 and 6 of the Complaint for lack of knowledge or information sufficient to form a belief as to the truth thereof.

4. Admit the allegations in the first sentence of Paragraph 7 of the Complaint, and deny the other allegations in that paragraph for lack of knowledge or information sufficient to form a belief as to the truth thereof.

5. Admit the allegations in Paragraphs 8 and 9 of the Complaint.

6. Admit and aver that the Idaho Act assigns the duty to administer and enforce the law to the Director of the Department of Finance, with the Attorney General of the State of Idaho acting as his attorney; and except as hereinabove admitted, deny the allegations in Paragraph 10 of the Complaint.

7. Admit the allegations in Paragraph 11 of the Complaint.

8. Deny the allegations in Paragraph 12 of the Complaint for lack of knowledge or information sufficient to form a belief as to the truth thereof.

9. Admit the allegations in Paragraphs 13 and 14 of the Complaint.

10. Deny the allegations in Paragraphs 15 and 16 of the Complaint for lack of knowledge or information sufficient to form a belief as to the truth thereof.

11. Admit the allegations in Paragraph 17 of the Complaint.

12. Admit that the Williams Act was duly enacted and contains certain provisions; and except as hereinabove admitted, deny the allegations in Paragraph 18 of the Complaint.

13. Deny the allegations in Paragraph 19 of the Complaint.

14. Admit that there is attached to the Complaint as Exhibit "A" a chart, and admit and aver that the federal law does not preempt state law as long as there is no actual and direct conflict between the two; and except as hereinabove admitted, deny the allegations in Paragraph 20 of the Complaint.

15. Admit that plaintiff on March 21, 1977, delivered an application for registration under the Idaho Act, and that on March 25, 1977, defendant Tom D. McEldowney, by and through his Deputy Administrator, Melvin J. Baptie, responded to plaintiff's filing by telecopy letter as

set out in Exhibit "B" to the Complaint; and except as hereinabove admitted, deny the allegations in Paragraph 21 of the Complaint.

16. Admit the allegations in Paragraph 22 of the Complaint, and aver that defendant McEldowney had no obligation to give plaintiff prior notice or hearing and that defendant McEldowney on March 25, 1977, a Friday, voluntarily transmitted to plaintiff the order and accompanying letter by telecopier.

17. Deny the allegations in Paragraph 23 of the Complaint.

18. Deny the allegations in Paragraphs 24 and 25 of the Complaint for lack of knowledge or information sufficient to form a belief as to the truth thereof.

19. Deny the allegations in Paragraphs 26, 27, 28, 29, 30, 32 and 34 of the Complaint.

WHEREFORE, said defendants pray that the action be dismissed, and for such other and further relief as the Court shall deem necessary and proper.

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Special Counsel

By _____
James P. Kaufman

[Certificate of Service Omitted in Printing]

In the United States Court of Appeals
for the Fifth Circuit

No. 77-1677

Great Western United Corporation,
Plaintiff-Appellee,

vs.

Wayne L. Kidwell, Attorney General of Idaho, and Tom D. McEldowney, Director of the Idaho Dept. of Finance,
Defendants-Appellants,

Louis J. Lefkowitz, Attorney General of New York, et al.,
Defendants.

[Filed Apr. 6, 1977]

Appeal from the United States District Court for the Northern District of Texas

Before COLEMAN, GODBOLD and CLARK, Circuit Judges.

BY THE COURT:

The order of the district court entered March 31, 1977, is stayed pending further proceedings in the district court.

The district court is directed to consider the issues of jurisdiction and venue and enter findings of fact and conclusions of law thereon before consideration of the merits. This proceeding involves novel and difficult issues which have broad impact upon federalism. Therefore, should the district court determine that it has jurisdiction and venue,

it should consider certification of this determination under 28 U.S.C. § 1292(b) before trial on the merits.

Motions for clarification and for rehearing are DENIED.

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PLAINTIFF'S EXHIBIT M-1:

Sunshine Mining Co. shares
held by brokers, by state.

State	0-99	100-199	200-499	500-1000	1000+ Over	All	Total Shares
ARIZONA	1	1	0	2	2	6	5673
CALIFORNIA	10	3	9	2	7	31	98268
COLORADO	1	1	0	0	0	2	122
CONNECTICUT	4	2	2	0	1	9	2297
WASHINGTON, D.C.	0	0	0	1	1	2	1702
FLORIDA	2	3	5	1	1	12	5698
GEORGIA	2	0	1	0	1	4	2452
HAWAII	2	0	0	0	0	2	30
IOWA	2	1	1	0	0	4	435
IDAHO	1	0	1	2	0	4	1713
ILLINOIS	4	3	5	1	2	15	49576
INDIANA	3	1	0	0	0	4	138
KANSAS	1	0	1	0	0	2	205
KENTUCKY	0	0	1	1	1	3	2527
MASSACHUSETTS	6	2	5	3	9	25	239669
MARYLAND	2	0	3	0	1	6	4206
MICHIGAN	0	2	3	2	2	9	4917
MINNESOTA	1	0	1	2	0	4	1404
MISSOURI	3	2	2	0	3	10	13195
MONTANA	0	1	0	1	0	2	716
NORTH DAKOTA	0	0	0	0	1	1	1446
NEW HAMPSHIRE	0	0	0	1	0	1	826
NEW JERSEY	2	0	2	1	3	8	19639
NEW MEXICO	0	0	0	1	0	1	525
NEW YORK	29	18	13	11	35	106	1839531
OHIO	1	0	4	2	3	10	6498
OKLAHOMA	1	0	1	0	1	3	2374
OREGON	0	2	1	1	0	4	1020
PENNSYLVANIA	3	4	7	1	4	19	11768
RHODE ISLAND	0	0	1	0	0	1	204
TEXAS	2	6	0	2	1	11	4370
UTAH	0	0	0	0	1	1	2724
VIRGINIA	2	1	1	0	0	4	433
WASHINGTON	2	0	2	3	6	13	10699
WISCONSIN	2	2	0	0	0	4	313
FOREIGN	0	0	0	0	2	2	3139
TOTAL	89	55	72	41	88	345	2340452

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PLAINTIFF'S EXHIBIT M-2:

Sunshine Mining Co. shares
held by individuals, by state.

State	0-99	100-199	200-499	500-1000	1000+ Over	All	Total Shares
ALASKA	15	9	4	1	0	29	2642
ALABAMA	53	22	14	6	2	97	15228
ARKANSAS	20	14	6	2	0	42	5382
ARIZONA	120	58	37	17	5	237	44880
CALIFORNIA	986	444	341	82	48	1901	299190
COLORADO	96	46	41	17	2	202	30279
CONNECTICUT	224	72	62	24	5	387	50675
WASHINGTON D.C.	40	11	16	3	1	71	9853
DELAWARE	26	9	4	1	0	40	3123
FLORIDA	446	259	231	53	28	1017	196487
GEORGIA	39	25	6	1	1	72	6674
HAWAII	45	33	17	6	0	101	13144
IOWA	80	36	23	1	3	143	18670
IDAHO	238	122	93	30	36	519	143939
ILLINOIS	490	306	204	54	40	1094	209601
INDIANA	106	55	44	8	2	215	28953
KANSAS	72	37	28	6	5	148	28854
KENTUCKY	66	21	15	5	2	109	13197
LOUISIANA	33	19	11	4	2	69	11476
MASSACHUSETTS	397	102	72	18	7	596	61955
MARYLAND	197	81	55	14	17	364	80457
MAINE	27	12	6	1	0	46	4417
MICHIGAN	290	150	124	32	15	611	129948
MINNESOTA	113	49	42	11	7	222	53191
MISSOURI	233	92	50	15	11	401	50865
MISSISSIPPI	24	13	16	0	1	54	8017
MONTANA	111	58	42	11	3	225	32208
NORTH CAROLINA	54	20	12	2	3	91	13572
NORTH DAKOTA	12	7	7	1	0	27	3586
NEW HAMPSHIRE	31	11	9	3	2	56	8550
NEW JERSEY	564	211	169	36	15	995	131248
NEW MEXICO	44	23	26	4	2	99	15108
NEVADA	37	15	16	2	2	72	19777
NEW YORK	1363	577	369	91	53	2453	381916
OHIO	257	153	102	18	12	542	88676
OKLAHOMA	43	22	12	1	6	84	17374
OREGON	139	59	47	16	9	270	75113
PENNSYLVANIA	634	234	184	38	15	1105	143936
PUERTO RICO	2	0	0	0	0	2	97
RHODE ISLAND	71	17	8	1	0	97	5798
SOUTH CAROLINA	36	17	10	5	1	69	10420
SOUTH DAKOTA	27	23	10	1	0	61	6752
TENNESSEE	73	33	19	1	0	126	11012
TEXAS	197	124	80	24	14	439	404191
UTAH	47	27	21	3	1	99	13211
VIRGINIA	108	49	39	5	3	204	34278
VERMONT	23	5	6	2	2	38	5858
WASHINGTON	744	313	225	72	60	1414	274008
WISCONSIN	198	138	61	18	14	429	122213
WEST VIRGINIA	36	6	11	1	0	54	5288
WYOMING	15	6	2	1	1	25	2855
FOREIGN	115	49	33	12	17	226	47409
TOTAL	9457	4294	3082	781	475	18089	3395551

PLAINTIFF'S EXHIBIT M-3:

Findings of fact and conclusions of law in Idaho litigation between Sunshine Mining Co. and Great Western United Corp., et al.

In the United States District Court
for the District of Idaho

Civil No. 77-1064

Sunshine Mining Company,
Plaintiff,

vs.

Great Western United Corporation, N. B. Hunt, W. H. Hunt, Hecla Mining Company, Silver Dollar Mining Company, William H. Love, Harry F. Magnuson, Charles E. Schwab, and G. Michael Boswell,
Defendants.

[Filed Apr. 22, 1977]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PURSUANT TO Plaintiff Sunshine Mining Company's motion for preliminary injunction having come on for hearing and oral argument being heard, and having considered the verified complaint and answer and briefs submitted by the parties, together with the exhibits admitted in evidence, the Court now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. That at all relevant times plaintiff, Sunshine Mining Company ("Sunshine") was and is a corporation organized under the laws of the State of Washington with substantial assets located in this District.

2. Sunshine has approximately 30,000 holders of common stock and has issued and outstanding approximately 5,800,000 shares of common stock.

3. Sunshine's common stock is registered pursuant to Section 12 of the Securities Exchange Act of 1934 (the "1934 Act"). Sunshine's common stock is listed and publicly traded on the New York Stock Exchange and its common stock is also traded on the Spokane Stock Exchange.

4. That at all relevant times defendant, Great Western United Corporation ("Great Western"), was and is a corporation organized under the laws of the State of Delaware, with its principal executive offices located in Dallas, Texas.

5. Since mid-December, 1974, defendants, N. B. Hunt, W. H. Hunt and G. Michael Boswell were and are directors of Great Western and Chairman of the Board, President and Executive Vice President, respectively, of Great Western.

6. Great Western's common stock is registered pursuant to Section 12 of the 1934 Act and is listed and publicly traded on the New York Stock Exchange and Pacific Stock Exchange.

7. Since mid-December, 1974, each of N. B. Hunt and W. H. Hunt were and are the owners of 32.5% of the issued and outstanding common stock of Great Western.

8. That at all relevant times, defendant, Hecla Mining Company ("Hecla") was and is a corporation organized and existing under the laws of the State of Washington with a principal office and substantial assets located in this District, including a non-operating interest in the Unit Area of the Sunshine Mine.

9. At all relevant times prior to March 18, 1977, Hecla owned approximately 210,160 shares of Sunshine's common stock.

10. At all relevant times, defendant, William H. Love ("Love") was and is the Chief Executive Officer and a director of Hecla and a resident of this District.

11. That at all relevant times, Silver Dollar Mining Company ("Silver Dollar"), was and is a corporation organized under the laws of the State of Idaho. Like Hecla, Silver Dollar has a non-operating interest in the Unit Area of the Sunshine Mine.

12. On and prior to March 18, 1977, Silver Dollar owned approximately 124,910 shares of Sunshine's common stock.

13. At all relevant times, defendant, Harry F. Magnuson ("Magnuson"), was and is President and Chief Executive Officer and a director of Silver Dollar and a resident of this District.

14. At all relevant times, defendant, Charles E. Schwab ("Schwab"), was and is a resident of the State of Colorado.

15. Prior to 1958, Sunshine, Hecla and Silver Dollar each owned or controlled certain mining interests in the Coeur d'Alene Mining District of Idaho. On September 25, 1958, they entered into a Unitization Agreement wherein

these interests were consolidated or unified into one area in the Sunshine Mine designated as the Sunshine Unit Area. Sunshine is designated the operator of the Unit Area on terms and conditions set forth in the Unit Agreement.

16. That at all relevant times, Sunshine was and is principally engaged in the mining of silver through the operation of the Sunshine Mine in the Coeur d'Alene Mining District of Idaho; in the manufacture, sale and installation of coated steel, aluminum and wood fences (through its subsidiary, Anchor Post Products, Inc.); the manufacture of piezo electric crystals and crystal filters (through its Piezo Crystal Company division); the manufacture of metal cabinets and accessories for the electronics industry and as a partner in various oil and gas leases.

17. In calendar year 1975, Sunshine, in conjunction with Hecla and Silver Dollar, produced approximately 5,130,000 troy ounces of silver extracted through the facilities of the Sunshine Mine. The production of the Sunshine Mine is not solely the property of Sunshine. The Unitization Agreement provides that Sunshine, as the operator of the mine, is entitled to approximately 57 percent of the profits, while Hecla and Silver Dollar are entitled to approximately 33 percent and 10 percent, respectively. The mine was the largest producer of mine-produced silver in the United States.

18. In calendar year 1975, Sunshine had operating revenue in excess of $55,000,000 and net income in excess of $4,200,000.

19. As of the close of its last fiscal year, ending December 31, 1976, Sunshine's assets were in excess of $56,500,000,

including cash and certificates of desposit in excess of $13,500,000. Its net income was $946,204. Sunshine Mine had been inoperative from March 11, 1976 to March 13, 1977.

20. The evidence is conflicting as to when a commitment from a bank to loan Great Western the funds for a tender offer—March 4th or March 10th or 11th—funds which would be required either (a) to make a "friendly" tender offer for Sunshine common stock, or (b) to make an "unfriendly" tender offer for Sunshine common stock, or (c) to buy the Sunshine Mine.

21. On March 18, 1977, in the morning, Great Western notified the New York Stock Exchange that they were proposing to purchase the Sunshine shares owned by Hecla and Silver Dollar and make a tender offer. Trading in Sunshine's common stock was suspended on March 18 and March 21, 1977. The proposed tender offer announcement was not to be made until Monday, March 21, 1977, and the possibility of a friendly tender offer was still under consideration. Prior to the announcement of the Proposed Offer, Sunshine Common Stock had closed on the New York Stock Exchange at $14.25 per share. Great Western's Proposed Offer was at $15.75 per share.

22. In the interim between February 15 and February 28, 1977, Mr. David Wagnon, a representative of Great Western, accompanied by Mr. John Wilcox, an independent geologist, traveled to Idaho and met with representatives of Hecla and Silver Dollar who were familiar with the operation of the Sunshine Mine. Wagnon or Wilcox was given written information about Sunshine. All of the written information received by Great Western was intro-

duced into evidence. The information received by Great Western was not used to determine whether or not to buy the shares in Sunshine. It was reviewed only to determine whether it contradicted public information. The majority of the information was found to be irrelevant and no conflict was found with publicly available information. Although Great Western attempted to determine whether the information was publicly available, it was unable definitely to determine whether all or some of the information was public. An attempt to summarize and fully disclose the information received by Great Western is included in the Schedule 13D. The Schedule 13D states:

> "The representatives were also provided by Hecla and Silver Dollar with certain information and reports, which were either obtained by Hecla and Silver Dollar from their own investigation of the Unit Area or provided by the Company to Hecla and Silver Dollar pursuant to the unitization agreement covering the Unit Area. Hecla and Silver Dollar did not warrant the accuracy of this information to the Purchaser. The information and reports, some of which may not have heretofore been publicly disclosed, related principally to ore reserves, operating costs, management and operation of Sunshine and indicated that total estimated ore reserves at the Sunshine Mine (including reserves in which others have an interest) at January 1, 1977, totalled approximately 1,385,000 tons with an estimated average grade of approximately 33 ounces of silver per ton; that operating costs (under then existing wage agreements) per ton of ore extracted from the Sunshine Mine

> (which are not necessarily indicative of future operating costs) were substantially higher for the period from 1973 through the first three months of 1976 than operating costs of the above-mentioned Hecla mine; and that, during the period from 1971 through the first three months of 1976, the percentage of silver contained in the ore mined at the Sunshine Mine as compared with silver contained in its ore reserves, on a per ton basis, was substantially lower than the corresponding percentage for the above-mentioned Hecla mine. The Purchaser has no basis to determine the fairness or accuracy of the information which it has received and cannot take responsibility therefor."

23. In 1964, Underweiser and a group of nominees were involved in a proxy contest to obtain seats on the Board of Sunshine. After obtaining seats on the Sunshine Board, Underweiser's group sought and obtained reimbursement. Thereafter, in 1974, a Mr. Ernst proposed a slate of nominees to the Sunshine board, which was not elected. Nevertheless, the Sunshine board of directors recommended to the shareholders that Mr. Ernst be paid $75,000 as reimbursement for expenses in the proxy fight. The payment of $75,000 was in fact made to Ernst. In view of Sunshine's past practice of reimbursing participants in proxy contests for their expenses in similar situations, Great Western believed that if it were successful in obtaining control of Sunshine, the shareholders committee which had been formed by Hecla and Silver Dollar would have accomplished one of its purposes and performed a valuable task to the shareholders of Sunshine and, therefore, it agreed to support (subject to approval by the Sunshine share-

holders) reimbursement of their expenses up to $200,000. In any event, the legality of the reimbursement is not a matter which leads to an injunction against a tender offer.

24. On the morning of March 18, 1977, Mr. Boswell attempted to reach Mr. Underweiser, Chariman of the Board of Sunshine, but Mr. Underweiser was not at his office. Later on that day, Mr. Underweiser returned the call to Mr. Boswell with his attorney on the telephone. Mr. Boswell stated that Great Western was proposing to purchase that day shares of Hecla and Silver Dollar and to make a tender offer. Mr. Boswell requested a meeting that afternoon with Mr. Underweiser. During the conversation, Mr. Boswell stated that Great Western would prefer to make a tender offer with the cooperation of Sunshine and its management.

25. In the afternoon of March 18, 1977, shortly before 3:30 p.m., Great Western executed agreements with Hecla and Silver Dollar for the purchase of 210,160 and 124,910 shares, respectively, of Sunshine common stock and Great Western took possession of certificates evidencing such shares. These agreements provided for delivery by Great Western to Hecla and Silver Dollar of separate unsecured promissory notes in the respective principal amounts of $3,152,400 and $1,873,650, each payable on or before June 30, 1980, with interest payable semi-annually, bearing interest at 130% the prime rate. Great Western also agreed that, in the event it purchased for cash more than 100,000 shares of Sunshine common stock prior to June 30, 1977, at an average per share cost higher than $15.00, the purchase price would be increased to the price paid by Great Western for such shares. Great Western further agreed

that it would arrange for the purchase of the unsecured promissory notes delivered to Hecla and Silver Dollar at their face values plus accrued interest after June 30, 1977 at the request of either Hecla or Silver Dollar. The obligation of Great Western to arrange for the purchase of the notes is not absolute and no obligation exists in the event that Hecla and Silver Dollar sell the notes without recourse on or prior to June 30, 1977.

26. Great Western advised that upon completion of the Offer a study lasting at least three months would be made. Only after such study and upon finding that Sunshine's public filings are accurate would a merger be proposed. In the Schedule 13D Great Western states:

> "The Purchaser has given and will continue to give consideration to what further action, if any, it may wish to take with respect to the remaining Shares after the expiration of the Offer. Among other things, the Purchaser will consider whether to seek to acquire all or a portion of the remaining Shares through open market purchases, through a tender or exchange offer, or by other means deemed advisable by it, or whether to propose a merger or similar combination transaction with the Purchaser, or a wholly owned subsidiary of the Purchaser (possibly involving cash, securities or both), or other transaction involving the Company. In this regard, the Purchaser intends to give serious consideration to a complete combination in the future of the Purchaser and the Company. Whether any such transaction will be proposed or initiated and, if they are, the terms thereof, will, of course, be dependent on a variety of factors, such as the number of Shares

purchased pursuant to the Offer or otherwise, market conditions, future prospects, asset values and earnings. If any such transaction is proposed or initiated, it might be on terms more or less attractive than the Offer, including, without limitation, involving a higher or lower price and the payment of cash or the issuance of securities or both in exchange for Shares or other securities of the Company. There can, of course, be no assurance that any such transaction will be proposed by the Purchaser or consummated, or as to the terms thereof or whether such transaction would be taxable or non-taxable to the holders of Shares."

27. On March 20, 1977, Sunshine advised Great Western by letter that no action was being taken on their proposal for cooperation in a tender offer by reason of insufficient time to respond. As of the April 7, 1977, hearing, Sunshine directors have not accepted or rejected the proposal to cooperate in a tender offer.

28. On March 21, 1977, Great Western issued a press release announcing a tender offer for up to 2,000,000 shares of Sunshine common stock at a price of $15.75 per share; on March 21, 1977, Great Western filed a Schedule 13D and exhibits with the SEC; on March 22, 1977, trading in Sunshine common stock was resumed on the New York Stock Exchange; on April 1, 1977, Sunshine instituted the present action, and this Court entered a temporary restraining order restraining Great Western from proceeding with its tender offer and set a hearing on Sunshine's Motion for a Preliminary Injunction for April 7, 1977, 9:30 a.m.

29. There is no evidence in the record of any conflict of interest between the Hunts and Sunshine. There is no evidence in the record that the Hunts could, even if they so desired, affect any market by controlling production of the Sunshine Mine. The most recent financial report shows Great Western's subsidiary held 12 million ounces of silver as of December 31, 1976. Silver is a world commodity and its price is set on a worldwide basis. In 1975, world silver stocks amounted to over 700 million ounces of silver of which nearly 400 million ounces were available for world consumption. In short, there is no evidence to indicate that in the event the tender offer is completed that the Sunshine stockholder would be adversely affected by the Hunts or Great Western trading in silver or other precious metals.

30(a). Great Western's Schedule 13D and proposed offer to purchase 2,000,000 shares of Sunshine's common stock which was filed with the SEC on March 21, 1977, contains an omission which should be corrected to clarify the statements contained therein: The fact of N. B. Hunt's plea of *nolo contendere*, the statute under which Mr. Hunt was prosecuted, and the $1,000 fine imposed should be fully and adequately disclosed. (Great Western has revised the Proposed Offer to reflect this information.)

(b) The existence of the 1974 consent decree was fully disclosed. This narrow consent decree was entered into by the parties on the understanding that it does not constitute any admission of wrongdoing in any proceeding.

(c) There is no credible evidence in the record of any alleged "plans" by Great Western to reduce Sunshine's earnings.

(d) Great Western's intentions concerning the possibility of a future merger with Sunshine are accurately and adequately disclosed.

(e) Sunshine alleges that the Schedule 13D omits to disclose that a merger or combination would result in unprofitable operations for Sunshine due to amortization and servicing costs. Mr. Bolle testified from Exhibit 89 which was not admitted in evidence for lack of foundation.

(f) There is no evidence in the record that Great Western's financial condition is unstable or that there are any uncertainties surrounding its continued operations. Great Western's accounting certification is admittedly a "very acceptable one." Great Western is a public company and its financial condition is fully described in its public filings, and any tender offer should disclose to the Sunshine shareholders where copies of the public filings could be obtained. Sunshine's own accountant failed to offer any evidence concerning Great Western's alleged financial instability.

(g) There is no evidence in the record concerning the amount of potential liability faced by Great Western in connection with alleged antitrust violations. Further, Great Western's auditors have stated and Great Western has itself disclosed the impossibility of an assessment of the amount of its potential exposure.

(h) There is no evidence in the record that any profit and loss figures will have to be restated.

(i) There is no evidence in the record of any of the alleged conflicts of interest between the Hunts and Great Western on one hand and Sunshine shareholders on the other.

(j) The Federal Trade Commission settlement entered in January, 1977, has already been publicly disclosed by Great Western in its public filings and it need not be further disclosed. The acts leading to the violations which brought about the settlement all took place prior to the Hunts taking control of Great Western and occurred before any of the defendants were officers or directors of that company.

31. The Schedule 13D accurately and completely sets forth and describes Great Western's plans concerning a merger or other combination between Great Western and Sunshine and all material information relating thereto. Since a proposed merger is dependent upon, among other things, the success of Great Western's tender offer, a lengthy study of Great Western and the accuracy of Sunshine's public filings, no further disclosure concerning the effects of a merger need be made at this time.

32. Sunshine's claims that the proposed tender offer by Great Western discriminates against the public shareholders and in favor of Hecla and Silver Dollar are without merit since:

(a) Proration will only occur if more than 2 million shares are tendered and the tender offer is therefore oversubscribed.

(b) The shares owned by Hecla and Silver Dollar have already been transferred to Great Western and Great Western is entitled to vote the shares and receive the dividends thereon. Great Western physically took possession of the shares owned by Hecla and Silver Dollar on March 18, 1977. Shareholders who tender shares pursuant to the

proposed offer will receive cash rather than a promissory note.

(c) Unlike other shareholders, Hecla and Silver Dollar expended substantial monies to improve the management of Sunshine through their efforts to oust present management from their entrenched positions.

(d) Great Western's intentions concerning its support of reimbursement for expenses incurred by Hecla and Silver Dollar are fully described in the Schedule 13D and proposed tender offer.

33. With respect to Sunshine's claims that Hecla provided Great Western with allegedly material non-public information, since Great Western has been unable to determine, despite repeated efforts, whether the information received from Hecla is in whole or in part non-public, it did not "knowingly disclose" non-public information. There is no evidence in the record that the information is "inside" information since there is no evidence in the record that Hecla or Silver Dollar are fiduciaries of or otherwise have any fiduciary obligation to Sunshine. Furthermore, the Unitization agreement fails to designate or otherwise require information received pursuant to its operation be deemed or otherwise kept confidential. There is no evidence in the record that the information received was material and, in any event, Great Western determined the majority of the information was irrelevant, did not rely upon it, and fully and fairly disclosed the existence, and to the extent necessary, the substance of the information which it received. The same or similar information is and has continuously been in the possession of Mr. Underweiser who has consistently purchased shares of Sunshine stock, including 400 shares during December, 1976, without revealing the existence or substance of this allegedly material information to the shareholders.

34. The testimony shows it would be almost impossible to undo a tender offer only after the tender offer has been completed. The tender offer is completed after the tendered stock is purchased and there are no further records of who tendered what. This can occur not less than 10 days after the commencement of the tender offer for less than all the shares of a target company *(see* § 14(d)(6)) and after seven days in all othertender offers (*see* § 14(d)(5)).

35. There is credible, uncontradicted, testimony to the effect that if a preliminary injunction is granted the price of Sunshine's shares will be depressed and the shareholders of Sunshine who wish to sell their stock on the open market will do so at a lower price and will be, therefore, irreparably injured. Great Western has not yet made any tender offer to the shareholders of Sunshine, and the evidence shows that at no time has it disseminated copies of the proposed offer to the financial community or to the shareholders of Sunshine. In the event Great Western made a tender offer containing disclosures which do not comply with the requirements of law, Sunshine may request, and the Court will be able to grant, effective relief at that time. Plaintiffs have failed to allege and demonstrate any irreparable injury. Sunshine has not demonstrated serious questions as to, nor shown a probability of success on, the merits sufficient to grant its motion for a preliminary injunction.

To the extent that any conclusion of law hereinafter set forth also sets forth a finding of fact, the same shall be deemed incorporated herein.

CONCLUSIONS OF LAW

Jurisdiction

1. Jurisdiction over this action is exclusively in this Court pursuant to Section 27 of the 1934 Act, 15 U.S.C. § 78aa.

Issuance of Injunctive Relief

2. In order to obtain the type of preliminary injunctive relief sought by Sunshine, plaintiff must make a clear showing of substantial likelihood of success on the merits. The record before this Court is insufficient to meet this burden with respect to any of the claims by Sunshine.

3. In passing the Williams Act, Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or present large accumulations of stock which would create the potential for such attempts.

4. The courts have interpreted and applied the Williams Act so as to protect shareholders not to give a management a tool to fight off unwelcome tenders.

5. Sunshine has failed to substantiate the heavy burden necessary to warrant the granting of preliminary injunctive relief against a tender offer.

6. The traditional prerequisite of irreparable harm is applicable to actions brought under the Williams Act, and in cases involving contests for corporate control.

7. Since a tender offer, such as Great Western's, for less than all of the outstanding shares of a corporation must remain open for at least ten days after copies of the offer or invitations are first published or set out, the offeror is effectively precluded from purchasing any shares until at

least ten days after the offer is actually commenced. In order to warrant injunctive relief, the injury complained of must be of such imminence that there is a clear and present need for equitable relief.

8. Sunshine is unable to show any imminent irreparable injury warranting the invoking by the Court of its equitable powers to enjoin Great Western's proposed tender offer.

Disclosure

9. In order for an omitted fact to be material, there must be a substantial likelihood that the disclosure of an omitted fact would have been viewed by a reasonable investor as significant in determining whether to tender or withhold his shares.

10. An offeror is not required to make predictions of future behavior which may cause the offeree or the public investor to rely on them unjustifiably.

11. Public companies need not disclose financial information about themselves otherwise publicly available to the shareholders.

12. Sunshine has not shown a probability of success on the merits with regard to its claims of non-disclosure.

Discrimination

13. The purchase by Great Western of and payment for the Sunshine shares owned by Hecla and Silver Dollar is a transaction separate and independent from the proposed tender offer announced by Great Western, and was consummated prior to any public announcement of the pro-

posed tender offer by Great Western and is not a part of that offer.

14. Rule 10b-13 applies only to purchases made after a tender offer is publicly announced or after it is commenced.

15. The purchase by Great Western of and payment for the Sunshine shares owned by Hecla and Silver Dollar does not discriminate against the other tendering shareholders in violation of Sections 14(d)(6) or 14(d)(7), which apply only to shares tendered pursuant to a tender offer.

Allegedly Material Inside Information

16. Possession of a document showing ore reserves other than proven reserves does not place Great Western in possession of material inside information so as to preclude it from making a tender offer without disclosing such information.

Fiduciary Duty

17. Great Western could not violate any fiduciary duty by receiving information from Hecla and Silver Dollar unless Great Western had knowledge that such information was confidential and was disclosed in violation of some duty of those companies.

18. There is no showing of any violation of a fiduciary duty on the part of Great Western.

DATED this 22d day of April, 1977.

/s/ MARION J. CALLISTER
United States District Judge

PLAINTIFF'S EXHIBIT M-4:

N.Y.S.E. pricing history of Sunshine Mining Co. stock from 12/31/76 through 5/18/77

86783310 N SSC SUNSHINE MNG CO
PRICING HISTORY: 1/2/68 TO 5/18/77

DATE	VOLUME	HIGH/ASK	LOW/BID	CLOSE
12/31/76	6700	11.125	11.000	11.000
1/3/77	10000	11.750	11.000	11.625
1/4/77	4100	11.875	11.500	11.875
1/5/77	5800	12.000	11.375	11.625
1/6/77	11800	12.250	11.500	11.875
1/7/77	10400	12.250	11.875	12.125
1/10/77	7600	12.125	12.000	12.000
1/11/77	8400	12.000	11.625	11.750
1/12/77	2800	11.875	11.375	11.875
1/13/77	4900	11.875	11.625	11.625
1/14/77	9400	11.750	11.375	11.750
1/17/77	3600	11.875	11.500	11.875
1/18/77	2900	11.875	11.625	11.875
1/19/77	5300	11.875	11.500	11.875
1/20/77	2800	12.000	11.625	12.000
1/21/77	2100	12.000	11.750	11.875
1/24/77	11100	12.125	11.750	12.125
1/25/77	4300	12.125	12.000	12.000
1/26/77	4500	12.125	11.625	12.125
1/27/77	4400	12.000	11.625	11.625
1/28/77	6100	11.750	11.375	11.375
1/31/77	6700	11.375	11.125	11.125
2/1/77	2400	11.500	11.250	11.500
2/2/77	2700	11.375	11.125	11.250
2/3/77	2300	11.375	11.125	11.250
2/4/77	3800	11.500	11.125	11.250
2/7/77	4700	11.375	11.000	11.250
2/8/77	4300	11.375	11.000	11.375
2/9/77	5100	11.875	11.375	11.750
2/10/77	6400	11.875	11.625	11.625
2/11/77	7300	12.000	11.625	11.875
2/14/77	5700	12.125	11.750	12.125
2/15/77	5400	12.125	11.875	12.000
2/16/77	4000	12.000	11.750	11.875
2/17/77	1700	11.875	11.750	11.875
2/18/77	5000	11.875	11.500	11.875
2/21/77	0	HOL	HOL	HOL
2/22/77	10700	11.875	11.500	11.750
2/23/77	24500	12.625	11.750	12.375
2/24/77	21300	13.000	12.500	12.750
2/25/77	8000	12.625	12.250	12.500
2/28/77	10400	12.750	12.375	12.625
3/1/77	3100	12.500	12.250	12.375
3/2/77	5200	12.625	12.375	12.625
3/3/77	9200	12.750	12.375	12.625
3/4/77	12000	12.750	12.375	12.750
3/7/77	38600	13.625	12.875	13.500
3/8/77	12500	13.500	13.125	13.375

3/9/77	14000	13.875	13.250	13.875
3/10/77	18500	14.000	13.500	13.500
3/11/77	14900	13.625	13.250	13.375
3/14/77	5500	13.500	13.250	13.500
3/15/77	8300	13.625	13.250	13.625
3/16/77	9700	13.875	13.625	13.875
3/17/77	20700	14.500	13.875	14.250
3/18/77	0	NA	NA	NA
3/21/77	0	NA	NA	NA
3/22/77	104700	16.000	15.750	16.000
3/23/77	81600	16.125	15.875	16.000
3/24/77	47300	16.000	15.750	15.875
3/25/77	28200	16.000	15.625	15.750
3/28/77	34400	15.875	15.750	15.875
3/29/77	57300	15.875	15.250	15.375
3/30/77	55300	15.750	14.750	15.250
3/31/77	6800	15.375	14.750	15.375
4/1/77	9500	15.375	15.250	15.375
4/4/77	10400	15.250	14.500	14.750
4/5/77	11300	15.000	14.500	14.750
4/6/77	26100	14.750	14.375	14.750
4/7/77	8600	14.875	14.375	14.625
4/8/77	0	HOL	HOL	HOL
4/11/77	3800	14.750	14.625	14.625
4/12/77	6700	14.875	14.625	14.625
4/13/77	8800	15.000	14.750	15.000
4/14/77	4500	15.000	14.750	14.750
4/15/77	4400	15.000	14.750	14.875
4/18/77	3200	14.875	14.750	14.750
4/19/77	4700	14.875	14.750	14.750
4/20/77	2500	14.875	14.750	14.750
4/21/77	2600	15.000	14.750	14.750
4/22/77	9700	14.875	14.625	14.875
4/25/77	9000	15.125	14.750	14.750
4/26/77	11100	15.000	14.875	15.000
4/27/77	5400	15.125	15.000	15.000
4/28/77	9800	15.000	14.875	14.875
4/29/77	6600	15.000	14.750	15.000
5/2/77	2900	14.875	14.750	14.750
5/3/77	1300	14.875	14.750	14.750
5/4/77	3500	14.875	14.750	14.750
5/5/77	1200	14.750	14.750	14.750
5/6/77	5700	15.000	14.750	15.000
5/9/77	5100	15.000	14.750	14.750
5/10/77	6200	14.875	14.750	14.875
5/11/77	2900	15.000	14.750	14.875
5/12/77	6700	15.000	14.625	15.000
5/13/77	16800	15.250	14.875	15.000
5/16/77	4300	15.000	14.875	14.875
5/17/77	4700	14.875	14.750	14.750
5/18/77	4600	14.750	14.750	14.750
5/19 WSJ	3500	14.875	14.625	14.750
5/20 Quotron	6700	14.75	14.50	14.75

ISSUE:
EXIT
--BYE
44.76 TRU X .12=$5.37
TERMINAL TIME: 0:05:08

PLAINTIFF'S EXHIBIT M-5:

Sunshine Mining Co.'s amendment to S.E.C. Schedule 14D

[Securities and Exchange Commission Letterhead]

ATTESTATION

I HEREBY ATTEST that attached is a full, true and complete copy of:

Amendment # 4 to Schedule 14D filed with this Commission April 7, 1977 by Sunshine Mining Company, in the matter of Sunshine Mining Company, pursuant to the provisions of the Securities Exchange Act of 1934, as amended, (File No. 5-1).

on file in this Commission

May 20, 1977

(Date)

/s/ CHARLES A. MOORE
Records Officer

It is hereby certified that James C. Foster, Director, Office of Reports and Information Service, Securities Exchange Commission, Washington, D.C., which Commission was created by the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), is official custodian of the books and records of said Commission, and all books and records created or established by the Federal Trade Commission pursuant to the provisions of the Securities Act of 1933 and transferred to this Commission in accordance with Section 210 of the Securities Exchange Act of 1934, and was such official custodian at the time of executing the above attestation, and that

he, and Charles A. Moore, Records Officer, and John H. Medlock, Chief, Administrative Proceedings Section, or any one of them, are authorized to execute the above attestation.

[SEAL]

By the Commission
/s/ GEORGE A. FITZSIMMONS
Secretary
George A. Fitzsimmons

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

AMENDMENT # 4

TO

SCHEDULE 14D

FILED PURSUANT TO RULE 14d-4 UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED

SUNSHINE MINING COMPANY

(Insurer to which this statement relates)

SUNSHINE MINING COMPANY

(Exact name of person filing)

Items 3 and 4 of the Schedule 14D filed by Sunshine Mining Company, dated March 22, 1977, are hereby amended to read as follows:

Item 3. *Persons Retained, Employed or to be Compensated*

Wertheim & Co., Inc. ("Wertheim") has been retained to advise Sunshine in connection with the proposed tender offer and other offers, if any, which may be made for shares of common stock of Sunshine, and to actively solicit other tender offers, or other offers, if in Wertheim's judgment such solicitation is warranted under the circumstances. In connection with these services, Sunshine has agreed to (i) pay Wertheim a minimum fee of $200,000; (ii) reimburse Wertheim for its out-of-pocket expenses, including the fees and expenses of its counsel; and (iii) indemnify Wertheim and its controlling persons against certain liabilities which may arise under applicable securities laws or otherwise as a result of its activities on behalf of Sunshine.

Sunshine has also agreed to pay Wertheim additional fees which are contingent upon the occurrence of certain events. The amount of any additional fees will be based upon various factors, including: (i) in the case of a tender offer by Great Western or an acquisition ("Acquisition") by Great Western of control of Sunshine or substantially all of the assets of Sunshine, as a result of a merger, exchange offer or similar transaction, (a) whether management of Sunshine opposes the transaction, in which event

Wertheim will only be entitled to additional compensation if Great Western fails to acquire more than 330,000 shares of common stock of Sunshine in a tender offer in addition to the shares it now owns; (b) the number of shares of common stock of Sunshine acquired by Great Western; (c) the price per share paid by Great Western in a tender offer to the extent in excess of $16.75 per share (exclusive of brokerage commissions and similar fees); and (d) the aggregate purchase price paid by Great Western in an Acquisition, if there is one; and (ii) in the case of a tender offer or an Acquisition by any person other than Great Western, if there is one, (a) the aggregate purchase price paid by such person in a tender offer, to the extent in excess of $33,500,000; and (b) the aggregate purchase price paid by such person in an Acquisition the negotiations for which commenced prior to March 30, 1978. In no event, however, will the aggregate fees, including these additional fees, payable by Sunshine to Wertheim under the agreement exceed $1,000,000. These additional fees are payable if any of the above described events occur prior to March 30, 1979 even if Wertheim's services have previously been terminated.

The agreement with Wertheim will remain in effect until March 30, 1979, unless it is terminated earlier by either party by notice to the other. As noted above, the compensation provisions of the agreement remain in effect through March 30, 1979, and the indemnity provisions will continue notwithstanding the termination or expiration of the agreement.

The foregoing description of the agreement between Sunshine and Wertheim is qualified by reference to the agreement, a copy of which is filed herewith as Exhibit E.

Sunshine does not regard the activities or proposed activities of Wertheim to constitute solicitations or recommendations to security holders within the meaning of this Item 3.

Georgeson & Co. has been retained by Sunshine, and may in the future make solicitations or recommendations on behalf of Sunshine to security holders of Sunshine. Georgeson & Co. will receive usual and customary compensation from Sunshine for its services.

Item 4. *Material to be filed as Exhibits*

(a) Exhibit A: Form of Press Release dated March 22, 1977.

(b) Exhibit B: Form of Press Release dated March 31, 1977.

(c) Exhibit C: Form of Press Release dated April 1, 1977.

(d) Exhibit D: Form of Press Release dated April 4, 1977.

*(e) Exhibit E: Agreement dated March 30, 1977 between Wertheim & Co., Inc. and Sunshine Mining Company.

*(f) Exhibit F: Form of Press Release dated April 7, 1977.

*Filed herewith.

I certify that to the best of my knowledge and belief the information set forth in this statement is true, complete and correct.

April 7, 1977

SUNSHINE MINING COMPANY

/s/ IRVIN P. UNDERWEISER
Chairman of the Board

EXHIBIT E

WERTHEIM & CO., INC.
Member New York Stock Exchange, Inc.
200 Park Avenue
New York, N.Y. 10017

March 30, 1977

Sunshine Mining Company
405 Park Avenue
New York, New York 10017

Attention: Mr. Irwin F. Underweiser, Chairman

Dear Sirs:

We understand that on March 20, 1977, the Board of Directors of Sunshine Mining Company ("Company") authorized the retention of Wertheim & Co., Inc. ("WCI") to provide financial consulting and other services in connection with a proposed tender offer ("Proposed Offer") to be made for certain outstanding common shares of the Company by Great Western United Corporation ("GWU") and related matters. This letter sets forth our agreement concerning the services to be provided by WCI, and confirms the understanding we have reached today regarding the fees to be paid and the indemnification to be afforded to WCI by the Company, as well as the indemnification to be afforded the Company by WCI.

I. *Services To Be Provided By WCI.* In consideration of the covenants and agreements herein set forth, WCI will render to the Company such services within the scope of WCI's experiences and expertise as the Company may at any time and from time to time request in connection with

the Proposed Offer and related matters. Without limiting the generality of the foregoing, WCI will, upon request of the Company:

(a) Consult with and render advice to the Company with respect to the adequacy of the consideration and other terms, and the fairness and reasonableness, of the Proposed Offer and any other offers made by GWU related to the Company; and

(b) Render advice of the type specified in subsection (a) above in connection with offers to holders of the Company's outstanding common stock which may be competitive with any offer made by GWU and actively solicit competing tender or other offers if in WCI's judgment such solicitation is warranted under the circumstances.

II. *Compensation.* The Company agrees to pay WCI, as compensation for its services hereunder, a fee consisting of the following:

(a) *Fee.* As a retainer, the non-refundable sum of $200,000, of which $100,000 shall be paid upon the signing of this Agreement and the balance shall be payable 30 days after the signing of this Agreement.

(b) *Expenses.* The full amount of any out-of-pocket expenses incurred by WCI in the performance of its obligations under this Agreement, including, but not limited to, the fees and disbursements of WCI's counsel, payment of which shall be made promptly after presentment by WCI to the Company at any time or from time to time; and

(c) *Additional Fees.* An additional fee in an amount in each case other than the cases provided for in para-

graphs 1 and 2 of this subsection (c) below by which any of the following exceed the fee provided for in subsection (a) of this Section II:

1. In the event that management the Company does not support any tending offer for shares of the Company's common stock by GWU and GWU is unable to acquire more than 330,000 of the outstanding shares of common stock of the Company in such tender offer (other than the shares currently owned by GWU as set forth in its Statements on Schedule 13D dated March 21, 1977; such shares are herein referred to as the "GWU Shares"), a sum of $200,000 in addition to the fee provided in subsection (a) of this Section II;

2. In the event of a cash tender offer by GWU which is not opposed by the management of the Company, a sum of $100,000 plus 5% of the result obtained by multiplying the difference (if any) between $16.75 per share and the per share purchase price paid for shares of Company common stock in such tender offer (exclusive of brokerage commissions and similar fees) by the lesser of the ?????????? the number of shares which GWU is obligated to purchase in such tender offer, as set forth in the terms thereof or the number of shares actually purchased;

3. In the event that, in a transaction or series of related transactions that is not opposed by the management of the Company, control or substantially all the assets of the Company is acquired by GWU as a result of a merger, exchange offer or similar transaction (regardless of whether or not the Company or GWU is the survivor of any such transacton), or as a result of a combination of a tender offer and a

merger, exchange offer or similar transaction, a sum equal to ½ of 1% of the aggregate purchase price payable in such merger, exchange offer or similar transaction, or in such combination (other than brokerage commissions and similar fees), provided, however, that in the event WCI is requested by the Company to render an opinion for use by the Company in any proxy material, any other material furnished to the Company's shareholders or registration statement relating to such transaction, WCI shall reduce the fees payable to it under this Agreement by the amount of $200,000 if it refuses to render such opinions, and provided further that any fee payable to WCI pursuant to Section II(c)2 hereof shall be credited against any fee payable to WCI pursuant to Section II(c) 3 hereof;

4. In the event that shares of the Company's common stock are acquired as a result of a tender offer by an offeror other than GWU, a sum equal to 5% of the amount by which the aggregate purchase price paid for all shares purchased by such other offeror exceeds $33,500,00, provided, however that any fees payable to WCI pursuant to Section II(c)1 hereof shall be credited against any fee payable to WCI pursuant to Section II(c) 4 hereof;

5. In the event that control of the Company is acquired, or substantially all its assets are sold, as a result of a merger, exchange offer or similar transaction (regardless of whether or not the Company is the survivor of any such transaction), or as a result of a combination of a tender offer and a merger, exchange offer or similar transaction, with a company other than GWU, a sum equal to 1% of the aggregate purchase price paid in such merger, exchange

offer or similar transaction, or such combination (not including brokerage commissions or similar fees), provided, however, that in the event WCI is required to render an opinion for use by the Company in any proxy material, other material furnished to the Company's shareholders or registration statement relating to such transaction, WCI shall reduce the fee payable to it under this Agreement by the amount of $200,000 if it refuses to render such opinion, and provided further that any fee payable to WCI pursuant to Section II(c)1 hereof or Section II(c)4 hereof, or both, shall be credited against any fee payable to WCI pursuant to this Section II(c)5; WCI shall not be entitled to any fee under this Section II(c)5, however, unless negotiations involving the parties to the transaction for which the fee is claimed commenced within one year of the date hereof and the transaction was completed within two years of the date hereof, provided that said two-year period shall be tolled on a day-by-day basis if and to the extent completion of such transaction shall have been delayed by litigation under, or by any action of any regulatory agency or governmental body involving, anti-trust or similar laws;

(d) Payments required to be made by the Company to WCI under Section II(c) hereof shall be made promptly after they become due upon completion of the transaction in question pursuant to the provisions of that Section. In order to prevent dilution of the fees payable to WCI hereunder, the provisions of this Section II shall be subject to appropriate adjustment in the case of stock splits, stock dividends or other similar events by the Company or affecting the Company's common stock. The other provisions of this Section II to the contrary notwithstanding, the aggregate fees payable to WCI by the Company pursuant to this Agreement shall not exceed $1,000,000.

III. *Undertakings of the Company.* In connection with any tender offer by GWU or any other transaction which would be the subject of compensation under this Agreement, the Company undertakes to provide WCI, prior to their use, with copies of all documents or other materials prepared by the Company relating to such tender offer or other transaction (i) filed with the Securities and Exchange Commission or any other federal or state agency, (ii) mailed or otherwise sent to shareholders of the Company, or (iii) published in any newspaper or other publication. The Company further undertakes that if any documents or materials required to be delivered to WCI hereunder name or make reference to WCI or if any work product of WCI prepared pursuant to this Agreement is used or referred to in such documents or materials, the Company will not file, mail, publish or otherwise use such documents or materials without the prior written consent of WCI, which consent shall not be unreasonably withheld by WCI.

IV. *Indemnification and Contribution.* (a) The Company agreed to indemnify and hold harmless WCI and each person, if any, controlling WCI within the meaning of the Securities Exchange Act of 1934, as amended (the "Act"), against claims, damages or liabilities, joint or several, to which they or any of them may become subject, under the Act or otherwise, and to reimburse WCI and such controlling persons for any reasonable expenses (including counsel fees) incurred by them in connection with investigating or defending any such losses, claims, damages, liabilities or actions, insofar as such losses, claims, damages or

liabilities (or actions in respect thereto) arise out of or are based upon (i) any untrue statement or alleged untrue statement of a material fact contained in any material used in connection with the Proposed Offer or any other transaction or arise out of or are based upon the omission or alleged omission to state therein a material fact required to be stated in such material or necessary to make the statements in such material not misleading or (ii) the failure of the Company or WCI, or both, to comply with the requirements of the Act or any similar federal or state law. The indemnity agreement contained in this paragraph, however, shall not extend to any loss, claim, damage, liability or action or any reimbursement (x) if the untrue statement or alleged untrue statement or omission or alleged omission was made in reliance upon and in conformity with information furnished to the Company by WCI specifically for use in any material by or on behalf of the Company, or (y) if the failure of the Company or WCI, or both, to comply with the requirements of the Act or any similar federal or state law is based on matters solely in the control of WCI.

(b) The Company further agrees to indemnify and hold harmless WCI against any other claims, damages or liabilities arising out of or based upon WCI's obligations under this Agreement and to reimburse WCI for any reasonable expenses (including counsel fees) incurred in connection with investigating or defending any such losses, claims, damages or liabilities (or actions in respect thereof), provided, however, that the indemnity agreement contained in this paragraph shall not extend to any loss, claim, damage, liability or action or any reimbursement if and to the extent that any such loss, claim, damage, liability or action or any

right to reimbursement arises solely by reason of any act or omission to act on the part of WCI not taken in good faith or by reason of gross negligence on the part of WCI.

(c) WCI shall not be entitled to indemnification under the provisions of (a) or (b) above unless it shall have given the Company notice of any action which may give rise to a loss, claim, damage or liability for which indemnification is sought and afford the Company an opportunity to participate in the defense of such action with Messrs. Fried Frank Harris Shriver and Jacobson, Messrs. Spengler, Carlson, Gubar, Churchill & Brodsky, or other counsel reasonably satisfactory to WCI. The failure to give such notice to the Company, however, shall not relieve the Company from any other liability it would have to WCI.

(d) In order to provide for just and equitable contribution in any case in which WCI makes a claim for indemnification pursuant to this Agreement but it is judicially determined (by the entry of a final judgment or degree by a court of competent jurisdiction and the expiration of time to appeal or the denial of the last right of appeal) that such indemnification may not be enforced, the Company and WCI shall contribute to the aggregate losses, claims, damages or liabilities to which they may become subject in such proportion that WCI is responsible for 2% of such aggregate losses, claims, damages or liabilities and the Company is responsible for the remaining portions; provided, however, that in no event shall WCI be required to contribute an amount in excess of the aggregate fees paid to it under this Agreement.

(e) WCI agrees to indemnify and hold harmless the Company and each person, if any, controlling the Company,

within the meaning of the Act, against claims, damages or liabilities, joint or several, to which they or any of them may become subject, under the Act or otherwise, and to reimburse the Company and such controlling person for any reasonable expenses (including counsel fees) incurred by them in connection with investigating and defending any such losses, claims, damages, liabilities or actions insofar as such losses, claims, damages or liabilities (or actions with respect thereto) arise out of or are based upon (x) any untrue statement or alleged untrue statement of a material fact contained in any material used in connection with the Proposed Offer or any other transaction or arise out of or are based upon the omission or alleged omission to state therein any material fact required to be stated in such material or necessary to make the statements in such material not misleading, if the untrue statement or alleged untrue statement or omission or alleged omission was made in reliance upon and in conformity with information furnished to the Company by WCI specifically for use in any material by or on behalf of the Company, or (y) the failure of the Company, or WCI, or both, to comply with the requirements of the Act or any similar federal or state law, if such failure is based on matters solely within the control of WCI. The Company shall not be entitled to indemnification under the provisions of this subsection unless it shall have given WCI notice of any action which may give rise to a loss, claim, damage or liability for which indemnification is sought and afford WCI an opportunity to participate in the defense of such action with Reavis & McGrath or other counsel reasonably satisfactory to the Company. The failure to give such notice to WCI, however, shall not relieve WCI from any other liability it would have to the Company.

V. *Termination.* (a) Except as otherwise provided herein, this Agreement shall remain in full force and effect for a period of two years from the date hereof, provided, however, that in no event shall the provisions of Section IV hereof terminate.

(b) The provisions of, and rights and obligations of the respective parties under, Sections I and III of this Agreement may be terminated by either party hereto upon written notice to the other party.

The Company agrees that if WCI exercises its rights to terminate this Agreement, any material subsequently used by or on behalf of the Company shall not refer to WCI.

If the foregoing correctly sets forth the understanding between us, please so indicate in the space provided below for the purpose, whereupon this letter and your acceptance shall constitute a binding agreement between us.

Very truly yours,

WERTHEIM & CO., INC.

/s/ JAMES A. HARMON
Chairman, Investment
Banking Committee

Accepted as of the date first above written.

SUNSHINE MINING COMPANY

/s/ IRWIN P. UNDERWEISER
Chairman of the Board

EXHIBIT F

PRESS RELEASE

For Immediate Release
April 7, 1977

Sunshine Mining Company announced today that Great Western United Corporation had made motions in a United States District Court in Texas, and that Hecla Mining Company and Silver Dollar Mining Company had made motions in a United States District Court in New York, to prevent Sunshine from further proceeding in the action Sunshine has brought in Idaho to enjoin Great Western and all persons acting in participation with it from making a tender offer for shares of Sunshine. All of these motions were denied. A hearing in the Idaho District Court on Sunshine's motion for a preliminary injunction is expected to begin today.

Sunshine also announced that the United States Court of Appeals for the Fifth Circuit has stayed the order issued by a United States District Court in Texas enjoining enforcement by the States of Idaho, New York and Maryland of their respective takeover laws in connection with Great Western United's proposed offer to acquire up to 2,000,000 shares of Sunshine.

In granting this stay, the Court of Appeals noted that this proceeding involves novel and difficult issues which have a broad impact upon federalism. The Texas District Court was directed by the Court of Appeals to consider and rule upon the issues of its jurisdiction and venue before considering the merits of Great Western's complaint. The Court of Appeals also stated that "should the district court determine that it has jurisdiction and venue, it should consider certification of this determination [for appeal] . . . before trial on the merits." The District Court hearing is presently scheduled for Friday, April 8, 1977 in Dallas, Texas.

Mel Baptie
- got ad
Since we know comments are con
Said he is preparing *a letter*
of *comments*
relates to Sections *12-15*
Not inclined to hold a
hearing—comply w/
comments
& 20 day period commences.
make amendments then *issue permit 20 days starts.*
or
take exception & they would
go immediately to a hearing

PLAINTIFF'S EXHIBIT 4
IDAHO COMMENT LETTER

JOHN V. EVANS
Governor

(SEAL)

STATE OF IDAHO
Department of Finance
Boise 83720
Tom L. McEldowney
Director

March 25, 1977

Steven C. Metzger
2827 First National Bank Building
Dallas, Texas 75202

Re: Great Western United Corporation Offer to Purchase Shares of Common Stock of Sunshine Mining Company and the Registration of Such Offer Under Title 30, Chapter 15, Idaho Code and the Regulations Adopted Thereunder.

Dear Mr. Metzger:

During the afternoon of March 21, 1977, Mr. David J. Wagnon, Vice-President of Western Investment Company, a subsidiary of Great Western United Corporation and Mr. Robert L. Magnuson attorney of the law firm Witherspoon, Kelley, Davenport & Toole, Spokane, Washington, hand delivered an application for registration under the Idaho Corporate Take-Over Law on behalf of Great Western United Corporation to this office.

We have reviewed the application of registration and the proposed form of Offer to Purchase for compliance with the Idaho Code and appropriate regulations thereunder. We present the following comments:

(1) Pages six through ten are missing from schedule 13D which has been marked as exhibit 1A under the application for registration.

(2) We ask that schedule A of schedule 13D be incorporated in the proposed form of Offer to Purchase.

(3) We ask that page 1 of the proposed form of Offer to Purchase set-forth a table of contents listing Sections 1-15 and identifying each section by their appropriate page numbers. We also ask that Sections 12, 13, 14 and 15 be placed at the front of the proposed form of Offer to Purchase immediately following Section 3 and preceding Section 4 on page 8.

The following comments pertain to the disclosure made within the proposed Offer to Purchase.

On page 29 we ask that the nature of the litigation between Sunshine Mining Company and the Shareholders Committee be disclosed and that the status of Charles E. Schwab be indicated. Disclose what is meant by the statement, "The purchaser understands that the committee has been desolved."

The second paragraph of page 29 begins: "Representatives of the purchaser met with Mr. Schwab on February 10, 1977 and with representatives of both Hecla Mining Company and Silver Dollar Mining Company and Mr. Schwab on February 15, 1977 to ascertain whether the purchaser had an interest in purchasing the shares." Please disclose who arranged those meetings and what communications took place at those meetings.

The second paragraph of page 29 begins: "During the week of February 21, 1977 representatives of the purchaser visited a mine in the Coeur d'Alene mining district operated by Hecla Mining Company which they were advised had operations generally comparable to those of the company." Please disclose who extended the invitation. Also identify the mine and who advised the representatives that the mine had operations generally comparable to that of Sunshine Company and upon what basis such advice was given.

The second sentence of page 30 states the representatives were also provided by Hecla Mining Company and Silver Dollar Mining Company with certain information and reports. Please disclose the names of the persons who provided such reports and identify the reports. Please furnish one copy of each report to the Department of Finance.

The third sentence of page 31 states, "Upon consummation of the Offer to Purchase, the purchaser intends to further investigate and evaluate the company's mining and other operations. Please disclose the extent of the purchaser's current evaluation and investigation of the company's mining and other operations and also disclose what further investigation and evaluation would be made upon the consummation of the offer.

The second sentence on page 38 states the purchaser believes that the offer will not be effective in the State of Idaho during any such hearing and that the purchaser

would not be permitted to purchase or pay for any shares tendered by shareholders in Idaho during such period. This sentence implies that the purchaser would be allowed to make tenders outside the State of Idaho. Section 30-1503(1), *Idaho Code*, states in part: "It is unlawful for any person to make a take-over offer involving a target company in this state, or to acquire any equity securities of a target company pursuant to the offer, unless the offer is effective under this chapter or is exempted by rule or order of the Director. It is our position that tenders made within and without of the State of Idaho would be unlawful unless the tender offer is effective or exempt under Chapter 15, Title 30 of the Idaho Code.

The provisions of paragraph 3 subpart d under caption *Registration of Take-Over Offers* as set-forth on pages 2 and 3 of the adopted Rules and Regulations under Title 30, Chapter 15, Idaho Code requires that information required of Items 1 through 9 of Form IDF-03-60-75 or an adequate summary thereof be disclosed in the proposed form of Offer to Purchase. We believe that disclosure required by Item 8 of Form IDF-03-60-75 which states: "Material information concerning the organization and operations of any offeror which is a corporation, including the year, form and jurisdiction of its organization, *a description of each class of its capital stock* and *long-term debt*, a description of the business done by the offeror and its subsidiaries and any material changes therein during the past three (3) years, *a description of the location and character of the principal properties of the offeror and its subsidiaries*, a description of any material pending legal or administrative proceedings in which the offeror or any of its subsidiaries is a party,

the names of all directors and executive officers of the offeror and their material business activities and affiliations during the past three (3) years, and financial statements of the offeror for its three (3) most recent annual accounting periods and any current period is not adequately disclosed under Section 12 on page 39. Please amend this section to include additional disclose concerning the items underlined [italicized] in item 8 above.

The last sentence of the first paragraph of page 40 states, "During the fiscal year ended May 31, 1975, the purchaser determined to dispose of "Great Western Cities" but no offers to purchase "Great Western Cities" are being considered at the present. Please disclose the reasons for deciding to dispose of "Great Western Cities".

The first sentence of the second paragraph on page 41 states, "The purchaser has filed with the Commission preliminary proxy material relating to a proposed plan of recapitalization. We ask that a more definitive description of the proposed plan be disclosed indicating any possible affect such plan might have with regard to the Sunshine Company.

We ask that the summary of litigation disclosed beginning on page 44 and ending on page 46, more accurately reflect the legal proceedings disclosed under item 5 in form 10K of Great Western United Corporation.

The second paragraph of page 47 states, "Approximately 33 million dollars required by the purchaser to purchase 2 million shares under the offer will be obtained under a 35 million dollar commitment to Western Investment from a bank from which it has borrowed in the past. You have

asked in a separate letter that the identity of the bank be held confidential. We agree to meet this request, however, we ask that one copy of the commitment agreement be furnished to the Department under confidential letter.

The second paragraph on page 49 states, "The purchaser expects that it will not depend upon earnings of the company (except dividends at the current rate annually paid by the company) to repay any borrowings under the commitment and under other presently outstanding indebtness of the purchaser and its subsidiaries. The purchaser does not intend to utilize shares or assets of the company for such purpose." Please disclose how the purchaser expects to repay the borrowings under the commitment.

The last sentence on page 49 states, "The purchasers [sic.] objective in making the offer is to acquire working control of the company." Please define and disclose what is meant by working control of the company.

The second sentence on page 51 states, "Although the purchaser has not decided which additional individuals it might nominate, such nominees will include Messrs., N. B. Hunt, W. H. Hunt and G. Michael Boswell." Please disclose whether or not there are any informal or formal agreements with Hecla Mining Company, Silver Dollar Mining Company or members of the Sunshine Shareholders Committee which would agree to appoint such persons to the Board of Directors of the Sunshine Company on behalf of the purchaser.

The second sentence on page 53 states, "The purchaser believes a stockholder should not be subject to such risk of ordinary income treatment if all of the shares owned by

him directly or indirectly were disposed of either pursuant to the offer or at any time prior to the effective date of any future merger or similar combination, etc." We ask that the wording, "subject to such risk" be eliminated from this sentence.

The second paragraph of page 53 states, "Under the laws of the State of Washington any merger, consolidation, liquidation or sale of all or substantially all of the assets of the company would require the affirmative vote of 66⅔ percent of the outstanding shares entitled to vote." Please disclose whether or not under Washington law the purchaser upon obtaining a majority representation of the Board of Directors could instruct such directors to authorize the issuance or sale of the company's authorized but unissued common stock, without the affirmative vote of 66⅔ percent of the outstanding shares entitled to vote. Also describe the affect of such action upon the Sunshine Company if the purchaser decided to take such action.

The second paragraph on page 56 states that if the purchaser acquires control of the company, etc. Please disclose and indicate what is meant by the word "control" as used in that sentence. Also indicate what impact a merger or disposition of some or all of the company's subsidiary and divisions would have on the Sunshine Mining Company and those stockholders who, for whatever reason, do not tender their shares pursuant to this offer and whether or not assets or funds received would be used to repay monies obtained from the bank commitment for this tender offer either directly or indirectly.

The last sentence of the second paragraph on page 56 states, "The purchaser has advised Hecla Mining Company and Silver Dollar Mining Company that it would support reimbursement by the company of the expenses of Hecla Mining Company and Silver Dollar Mining Company in connection with the activities of the Shareholders Committee to maximum of $200,000." It is the Department's view that this reinstatement if made may constitute a violation under Section 30-1505(2), *Idaho Code,* which states in part: "It is unlawful for any offeror or target company or any controlling person of an offeror or target company or any broker-dealer acting on behalf of an offeror or target company to engage in any fraudulent, deceptive or manipulative acts or practices in connection with a take-over offer. Fraudulent, deceptive and manipulative acts or practices include, without limitation: (2) Sale by any controlling stockholders of a target company in connection with a take-over offer of all or part of their equity securities to the offeror at a price higher than that to be paid other stockholders pursuant to the offer."

Please disclose whether or not the purchaser has or intends to enter into any working or financial agreements other than the March 18, 1977 stock purchase of 335,070 shares of stock in Sunshine Mining Company with Hecla Mining Company, Silver Dollar Mining Company or any member of the dissolved Sunshine Shareholders Committee.

Based upon the above comments and under the provisions of Section 30-1503(3), *Idaho Code,* the Director has summarily ordered a delay of the effective date of the registration and the proposed tender offer.

The Department takes the position that the registration statement filed March 21, 1977 is not complete, as not all of the material information is disclosed. The twenty days referred to in Section 30-1503(5), *Idaho Code,* begins to run from the time a complete registration statement within the meaning of Section 30-1503(2), *Idaho Code,* is received and filed. Therefore, this Department will regard the filing date of Great Western United Corporation registration to be the date upon which the amendments, as requested above, are received and accepted as complete. The twenty day limit for hearing shall begin to run as of such date.

The Department is prepared to issue a permit granting effectiveness to this registration upon a determination that the requested amendments are complete, contain all of the requested information, and otherwise comply with Chapter 15, Title 30, Idaho Code and the regulations adopted thereunder.

Should Great Western United Corporation decide not to file the amendments as requested, the Director is prepared to call for a hearing on his own initiative, to determine whether or not the application filed on March 21, 1977 contains sufficient disclosure.

Sincerely,

/s/ MELVIN J. BAPTIE
Deputy Administrator-Securities

MJB/rm

PLAINTIFF'S EXHIBIT 5—IDAHO ORDER

In the Office of the Director of Finance,
State of Idaho

In the matter of

Great Western United Corporation's offer to purchase shares of common stock of Sunshine Mining Company

ORDER

WHEREAS, on the afternoon of March 21, 1977, GREAT WESTERN UNITED CORPORATION filed an application for registration under the Idaho Corporate Take-Over Law relating to an offer to purchase shares of common stock of Sunshine Mining Company; and

WHEREAS, Title 30, Chapter 15, *Idaho Code,* known as the Idaho Corporate Take-Over Law, governs the take-over offer filed by GREAT WESTERN UNITED CORPORATION; and

WHEREAS, the administration of the Idaho Corporate Take-Over Law has been placed with the Director, Department of Finance; and

WHEREAS, Section 30-1503(3), *Idaho Code,* provides that the director may by order summarily delay the effective date of the offer if he determines that the registration statement does not contain all of the information specified in section 30-1503(2), *Idaho Code,* or does not

provide full disclosure to offerees of all material information concerning the offer; and

WHEREAS, the offering statement has been carefully considered and analyzed; and,

WHEREAS, certain material information has been found to be lacking in the registration statement and the proposed form of Offer to Purchase; and

WHEREAS, the material information not provided in connection with the said take-over offer is fully specified in the letter of comment dated March 25, 1977, given to GREAT WESTERN UNITED CORPORATION, and incorporated in this Order by reference.

NOW THEREFORE, IT IS HEREBY ORDERED THAT the effective date of the offer be delayed.

DONE AND DATED this 25th day of March, 1977.

/s/ TOM D. MCELDOWNEY
Director of Finance
State of Idaho

PLAINTIFF'S EXHIBIT 11:

Wall Street Journal quotations on Sunshine Mining Co. stock from 3/15/77 to 4/6/77

SUNSHINE MINING COMPANY QUOTATIONS
AS EXTRACTED FROM THE WALL STREET JOURNAL

Date	Volume	High	Low	Close	Change
3/15	8,300	13⅝	13¼	13⅝	+ ⅛
3/16	9,700	13⅞	13⅝	13⅞	+ ¼
3/17	20,700	14½	13⅞	14¼	+ ⅜
3/18	Trading Halted				
3/21	Trading Halted				
3/22	104,700	16	15¾	16	+1⅞•
3/23	81,600	16⅛	15⅞	16	.....
3/24	47,300	16	15¾	15⅞	− ⅛
3/25	28,200	16	15⅝	15¾	− ⅛
3/28	34,400	15⅞	15¾	15⅞	+ ⅛
3/29	57,300	15⅞	15¼	15⅜	− ½
3/30	55,300	15¾	14¾	15¼	− ⅛
3/31	6,800	15⅜	14¾	15⅜	+ ⅛
4/1	9,500	15⅜	15¼	15⅜	.....
4/4	10,400	15¼	14½	14¾	− ⅝
4/5	11,300	15	14½	14¾	.....
4/6	26,100	14¾	14⅜	14¾	.....

• ex-dividend.

PLAINTIFF'S EXHIBIT 12:

Comparison of basic requirements of various state takeover laws compiled by Professor Leon Lebowitz

STATE	% BENEFICIAL OWNERSHIP TRIGGERING STATUTE	TARGET COMPANIES COVERED	PRE-TENDER OFFER PURCHASES	EXEMPTIONS: OFFER TO LESS THAN MIN. NO.	EXEMPTIONS: ACQUISITIONS LESS THAN 2%	EXEMPTIONS: FRIENDLY TAKE-OVER	EXEMPTIONS: NO INTENT TO CONTROL	EXEMPTIONS: EXCHANGE OFFER	EXEMPTIONS: NOT REG. $12 EXC. ACT
Pa.	5%	1) Incorp. or 2) princ. place of bus. & sub. assets.		< 25 within preceding 12 months	X	X	X		< 100 shareholders, < $1 million assets
Colo.	10%	Incorp. or princ. place of business.			X		X	X	X
N.Y.	5%	Incorp. or princ. place of bus. & subst. assets.		< 50	X	X	X	X	X
Del.	5%	Incorp. in Del.		< 30 holders					
Kan.	20%	Incorp. or princ. place of bus. & subst. assets. Must have purpose of change of control or mgmt.	May not make takeover bid offer if off'r has acquired > 2% of securities unless off'r has made public anno't prev. of intent to change control.	< 15		X	X		
Ky.	5%	Incorp. or have princ. place of bus. and subst. assets	No off'r can make bid if he owns 5% of stock any of which purchased in last 12 mos. if he failed to publicly announce intention to gain control when he purchased stock.	< 10		X			
Utah	5%	Incorp. or princ. place of business			X	X	X		X
Tenn.	10%	Incorp. or princ. place of bus., which has subst. assets.	No offer if off'r owns 5% of co. & has purchased stock in last year unless he made public announcement of intention.	Isolated--sole acct of off'r good faith 15		X		X	< 50 holders

STATE	% BENEFICIAL OWNERSHIP TRIGGERING STATUTE	TARGET COMPANIES COVERED	PRE-TENDER OFFER PURCHASES	EXEMPTIONS					
				OFFER TO LESS THAN MIN. NO.	ACQUISITIONS LESS THAN 2%	FRIENDLY TAKE-OVER	NO INTENT TO CONTROL	EXCHANGE OFFER	NOT REG. §12 EXC. ACT
S.D.	10%	Incorp. or princ. place of bus. or subst. assets	If more than 10% acquired must file purpose w/i 10 days; identity & background source & amt of funds--if borrowed. Change in structure if control sought. No. of shares, material terms of agreemt with respect to shares. May file 13(d) in its place.	No more than 10 people withi. 12 mos.	X	X	X	X	
Ind.	10%	Incorp. or has princ. office or subst. assets.		Offer to < 50 owners	X	X	X		
Idaho	5%	Incorp. or princ. office, which has subst. assets.		Offer to not more than 10	X	X		X	< 100 stockholders
Alaska	5%	Incorp. or has princ. office and subst. assets.				X			Co. with < 100 stockholders
Nevada	10%	Incorp.							
Conn.	10%	Incorp. or with princ. exec. offices or maj. of bus. oprns.		100	X		X	X	< 100 stockholders
Wis.	5%	Incorp. or has princ. office, which has subst. assets, whose equity sec. are reg'd, & which may be involved in take-over relating to any class of its securities.		10, during 12-month period.	X	X		If offer is exempt from reg. under '33 Act.	< 100 stockholders

STATE	% BENEFICIAL OWNERSHIP TRIGGERING STATUTE	TARGET COMPANIES COVERED	PRE-TENDER OFFER PURCHASES	EXEMPTIONS					
				OFFER TO LESS THAN MIN. NO.	ACQUISITIONS LESS THAN 2%	FRIENDLY TAKE-OVER	NO INTENT TO CONTROL	EXCHANGE OFFER	NOT REG. §12 EXC. ACT
Mass.	10%	Incorp. or princ. place of business	Must be less than 5%.		X	X			< 25
Mich.	5%	Incorp. or princ. place of business		15 during 12-month period	X	X			100
Md.	5%	1) Incorp.; 2) Primary place of bus. or subst. portion of assets		25	X	X	X	X	< 100
La.	5%	Incorp. or princ. place of bus. or subst. portion of assets or more than 50% of its employees, & has aggregate assets w/i & w/o state of $50 million.			X	X	X		co. w/less than 100 owners
Minn.	10%	1) Incorp. or princ. place of bus. 2) Subst. portion of assets in state 3) Equity shares of any class are or have been w/i 2 yrs. registered in Minn.	May not file a regist. statement for proposed take-over offer until 60 days after ownership stm't filed.			X	X	X	
Ohio	10%	Incorp. or princ. place of bus. & subst. assets.	If 5% of shares obtained in past 12 mos. w/o giving notice of intent to acquire control, then no take-over bid for 12 months.	From not more than 50 persons		X		X	
Va.	10%	Incorp. & doing bus. in Va.							
Hawaii	10%	Incorp. & doing bus. in Hawaii.							< 100 shareholder & $1 million in assets.

STATE	ADVANCE NOTICE REQUIREMENT	HEARINGS	INFORMATION REQUIRED
Pa.	20 days--reg. stmt. sent to Commission; target & local bargaining representative. Publicly disclose offering price, etc.	By Commissioner or at request of target co. w/i 30 days; determination w/i 30 days after close of hearings.	Copies of all material used in offer, background & identity of all persons, source & amount of funds, a description of material terms of any financing arrangements, plans for change in corporate structure, # of shares owned by off'r, contracts which off'r has w/respect to shares of target-joint ventures, withholding of proxies, etc. *Particulars as to contracts of employment purchase of services or property from officers/directors of target. *Corp. info on off'r. Legal matters involving antitrust, equal opportunity & environmental matters are material.
Colo.	10 days prior to offer. *No waiting period after filing if friendly t-o. 5 day waiting period after amendment. *Note: Waiting period does not preclude publishing details of tender offer. Recommendations to accept/reject to be filed with Commissioner.	No provision.	Information required by 13(d) of 1934 Act.
N.Y.	20 days	Hearing scheduled w/i 15 days of filing of reg. stmt., held w/i 40 days determination w/i 30 days of completion of hearing.	Copies of all materials, identity & background of all persons, source & amount of funds, liquidation plans or change in corp. structure, # of shares beneficially owned, contracts w/respect to equity shares, i.e. proxies, puts & calls, etc., complete corp. info.
Del.	Not less than 20 days nor more than 60 days file notice with target corporation. *Provision for competing off'r--may make offer for securities in same class as in orig. offer at or after date that orig. off'r is allowed to make offer.	None.	To be furnished to corp. name, address of off'r & its directors & officers, type of securities & price offered, duration of offer, date on which off'r may first purchase securities, amt. of securities to be purchased, whether off'r accepts all shares tendered or conditions upon which acceptance is made, # of shares owned beneficially by off'r, contracts w/respect to ownership, voting rights of securities of target, copies of balance sheet of offeror.

STATE	ADVANCE NOTICE REQUIREMENT	HEARINGS	INFORMATION REQUIRED
Kan.	30 day disclosure	Target co. may request w/i 15 days; Commissioner may order	Copies of materials, identity & background of persons, source & amt. of funds, plans for change in corp. structure or personnel policies, # of shares beneficially owned by offeror. Contracts w/respect to securities of target, complete corp. info for 5 years.
Ky.	20 days	Target can request hearing w/i 40 days; adjudicated w/i 60 days.	Copies of all materials, identity & background of all persons source & amt of funds, # of shares offeror beneficially owns--complete info on corp. organization.
Utah	20 days	Commission calls hearing w/i 10 days; take-over effective 7 days after Commission's determination. Hearing held w/i 20 days, completed w/i 30 days; determination w/i 10 days after hearing. *Review w/S.Ct.	Identity & background of persons, source & amt of funds--if borrowed describe transaction, plans for change in corp. structure, # of shares beneficially owned, contracts w/respect to shares, info on corp. organization, financial statements, copies of take-over offer. May file copies of material filed with SEC in lieu of above.
Tenn.	Must file reg. statement; 10 day waiting period.	w/i 20 days; w/i 30 days Comm. may deny effectiveness of offer--judicial review.	Identity & background of persons, source & amt of funds, any plans to change corp. structure, mgmt or personnel, # of shares beneficially owned; contract w/respect to securities between offeror & target--voting proxies, etc. Corporate information--financial stmts for 3 years. Copy of all mat'l.
S.D.	May not file reg. stmt. for 60 days if ownership stmt delinquent. Take-over offer effective after 10 days.	Scheduled by Comm., target or 10% shareholder w/i 20 days. Director may deny registration.	All of info required for 10% acquisition stmt. Copies of solicitation materials; complete corporate information.
Ind.	20 days notice; Comm'r may accelerate effectiveness.	Dep't may hold hearing--target may request w/i 20 days; determination w/i 60 days.	Description of offeror (3 yrs activities); biography if offeror is individual; description of funds, liquidation plans, # of shares beneficially owned, prior agreements.
Idaho	Must file w/i 10 days after acquisition of 5%. Must file reg. stmt for take-over.	Becomes effective when approved by director. Direct. or target w/i 20 days.	Identity & background of persons buying stock, description of funds, liquidation plans, prior ownership.
Alaska	20 days notice	w/i 20 days by dep't. adjudicate w/i 30 days	Names & addresses of associates, terms of offer, description of funds, liquidation plans, shares owned prior to offer, prior agreements, description of offeror.

STATE	ADVANCE NOTICE REQUIREMENT	HEARINGS	INFORMATION REQUIRED
Nev.	10 days in advance	File w/target co.--not state securities.	Name, address, business experience, source & amt of funds, and if borrowed, plans to liquidate, # of presently owned shares; contracts for joint ventures, proxies, etc., all materials used in solicitation. To be filed w/target no later than time copies are first published.
Conn.	Offer effective 10 days after filing regis. statement.	If requested by target co. or holders of 10% stock, held within 30 days of filing.	Copies of all materials. Identity & background of all persons for whom offer is made. Source of funds. Liquidation plans. # of shares of target co. held. Prior agreements or contracts w/respect to equities. Amount of material interest in target co. involved in deal within last 3 years; prior agreements w/r individuals. Latest annual report & proxy stmts of offeror. Intended commencement date of offer.
Wisc.	Offer effective 10 days after filing regis. statement.	If requested by target co., held within 20 days, report w/i 30 days.	Identity & background of all persons, source & amt of funds. Liquidation plans. # of shares held. Agreement w/respect to securities. Materials, description of operations last 3 years. Description of individual.
Mass.	30 days after public announcement of terms.	If requested by target w/i 15 days; adjudication w/i 90 days.	Materials identity & background of people. Source of funds; liquidation plans; # shares held; agreements w/respect to securities. Organization and operations of offeror. Description of court proceedings involving offer. How many offers made within 5 years. Felony record of officers, and if involved in judgment concerning antitrust, fair employment, securities transactions, environmental protection.
Mich.	10 days	Within 20 days regis. is filed.	Materials, description of corp., inc. changes in last 5 yrs. Background of individual, inc. business during last 5 yrs. Source of funds; liquidation plans; # shares owned. Prior agreements w/respect to securities and individuals. 3 cps offer. Other info administrator requests.
Md.	20 days		Name & address; # of shares to be purchased; duration of offer. If will all or any part of shares offered. Conditions of acceptance; any contractual terms; info required by SEC.
La.	Effective 20 days after filing; publicly announce offering & notify target co. Comm'r may accelerate.	Hearing ordered by Comm'r or request of target co.; held w/i 20 days of hearing notice; determination w/i 60 days after conclusion of hearing.	Identity & material info concerning offeror--comprehensive corp. info; source & amt of funds; description of transaction involving borrowed funds; plans for any change in corp. structure, mgmt or personnel; # or shares beneficially owned; contracts w/respect to equity shares, info as to contracts w/any officer/director of target w/respect to purchase by offeror other than by tender offer or retention of position or w/respect to recommendation; favorable to take-over bid; material to be furnished to offeree.

STATE	ADVANCE NOTICE REQUIREMENT	HEARINGS	INFORMATION REQUIRED
Minn.	File acquisition stmt 10 days after acquiring 10%. Registration stmt for take-over bid filed--effective in 10 days.	At request of target or Comm'r w/i 20 days of filing; determination w/i 20 days after hearing closed.	Info for 10% acquisition of shares; identity & background, source & amt of funds--arrangements for borrowed funds, plans for corp. structure, mgmt or personnel, # of shares owned, material terms of contract w/respect to equity shares. May file 13(d) stmt in lieu of above. Registration stmt--info above, copies of materials, corp. info on offeror.
Ohio	Publicly announce & send materials 20 days in advance.	On request of target or ordered by Division w/i 40 days of filing w/i 60 days of filing	Info required--copies of all materials, identity & background of persons, source & amt of funds, plans to change corp. structure, personnel, employment, # of shares beneficially owned, contract w/respect to shares--proxies, etc., complete corp. info.
Va.	20 days	Hearing ordered w/i 10 days of filing by Comm. or target; hearing w/i 40 days.	Name, address, business experience, terms & conditions of take-over bid, plans for liquidation, source & amt of funds. complete info as to organization and operations of offeror; copies of all materials.
Hawaii	60 days	On order of Comm'r--at request of target.	Names & addresses of offerors; terms of offer, description of funds, liquidation plans, shares owned prior to offer, any agreements w/respect to shares, description of offer.

STATE	REQUIRED OFFERING PERIOD & WITHDRAWAL PRIVILEGES	PRO RATA ACCEPTANCE	INJUNCTIVE RELIEF	ANTI-FRAUD PROVISION	CIVIL LIABILITY	CRIMINAL LIABILITY
Pa.	Withdrawal--before 7 days--after 60 days	Pro rata acceptance of share w/i 10 dys	Comm'n cease & desist order---court injunction	None.	Recission or damages--control persons & broker; dealers jointly & severally liable.	Wilful violation of info; filing & solicitation materials fine* imprisonment
Colo.	Shares deposited for not less than 15 days; withdrawal w/i 15 days & after 35	Pro rata; no time limit	X	None.	Liability for untrue stmt or omission of mat'l fact, recission or damages--all involved jointly & severally liable.	No provision.
N.Y.	No provision.	No provision.	X	X	No express provision.	Wilful violation is Class A misdemeanor.
Del.	Open at least 20 days; withdrawal during period offer is open.	Pro rata acceptance entire period.	Exclusive jurisdiction w/chancery court.	None.	Court may reward relief.	No provision.
Kan.	No provision.	Pro rata acceptance of shares w/i 10 days.	No provision	None.	Subject to liabilities in K.S.A. 17-1267.	Penalties imposed by another statute.
Ky.	No provision.	Pro rata w/i 10 days.	No provision.	Director of securities may prescribe rules for defining fraudulent practices.	Offeree entitled to remedies applicable to purchaser. K.R.S. 292.991; offeror subj. to penalties applicable to seller.	No provision.
Utah	Shares deposited not less than 15 days or more than 60 days.	Pro rata w/i 10 days.	Comm'r may issue a stoporder.	X	Liable for untrue stmt or misleading fact--recover security or damages; participants are jointly & severally liable.	Wilful violation is misdemeanor.
Tenn.	Withdrawal w/i 7 days--after 60 days.	Pro rata acceptance w/i 10 days.	X	X Statute defines acts.	Liability for false stmt of mat'l fact--recission, damages figured by statute.	Knowingly violate act misdemeanor 30-100 days jail, $50-2500 fine; knowingly engage in fraudulent misrepresentation--felony.

STATE	REQUIRED OFFERING PERIOD & WITHDRAWAL PRIVILEGES	PRO RATA ACCEPTANCE	INJUNCTIVE RELIEF	ANTI-FRAUD PROVISION	CIVIL LIABILITY	CRIMINAL LIABILITY
S.D.	Withdrawal w/i 7 days & after 60 days	Pro rata acceptance w/i 10 days	Cease & desist order by Comm'n; court injunction	X	Express provision; recovery of security; measure of damages.	Fine & imprisonment, $5000 - 5 years.
Alaska	Shares tendered for not less than 21 days nor more than 35 days.	Pro rata acceptance for entire time.	X	X	Express provision; recover shares, dividends or damages--att'ys fees.	Violation of act up to 3 years & $5000.
Idaho	Withdrawal up to 7 days, after 60 days.	Pro rata acceptance within 10 days.	X	X	Express provision; may sue to recover security or damgs.	$5000 or 3 years for wilful violation.
Ind.	Withdrawal up to 3 days prior to termination.	Pro rata acceptance for entire time.	X	None.	Express provision recover shares or damages, att'ys fees.	Failure to file disclosure stmt, 1 yr & $500; misrepresentation of material fact 1-5 yrs, $10,000; publish false facts 1-5 yrs, $10,000.
Nev.	Shares may be deposited not less than 21 days nor more than 35 days.	Pro rata acceptance for entire time.	No provision.	X	Untrue stmt of mat'l fact, offerees may recover shares, dividends, interest, att'ys fees.	No provision.
Conn.	Withdrawal up to 3rd day prior to termination date.	Pro rata for entire period.	X	Comm'r may make rules defining fraud. prac.	No provision.	Fine $5000, up to 5 yrs in prison.
Wis.	Withdrawal w/i 7 days after offer becomes effective.	Pro rata acceptance within 10 days.	X	X	Express provision, excess of value on date of purchase or at present, whichever greatest.	$5000 fine, 5 yrs, or both.
Mass.	Up to 5 days of termination offer.	Must buy all shares tendered.	X	X	Express cause of action, recission or damages, lost income.	$5000 fine, 3 yrs, or both.
Mich.	No provision.	For entire period offer open.	X	None.	Recovery security plus lost income, reasonable attorneys' fees.	No provision.

STATE	REQUIRED OFFERING PERIOD & WITHDRAWAL PRIVILEGES	PRO RATA ACCEPTANCE	INJUNCTIVE RELIEF	ANTI-FRAUD PROVISION	CIVIL LIABILITY	CRIMINAL LIABILITY
Md.	Withdrawal w/i 7 days & after 60 days.	Pro rata acceptance w/i 10 days.	X	X	No provision.	No provision.
La.	No provision.	Entire period.	Sought by Comm'r, target co. or any record or beneficial owner.	X Fraudulent acts defined by statute.	Liab. for off'r, control persons & brpker-dealer. Recission, damages, atty's fees. Liab. to person who did not sell to off'r.	Failure to file--fine & imprisonment; knowingly misrepresents material fact, up to 5 yrs & $10,000.
Minn.	Withdrawal w/i 7 days or after 60 days.	Pro rata acceptance w/i 10 days.	Cease & desist order injunction.	X Statute defines fraudulent pracs.	Off'r, control persons & broker-dealer joint & several liab. Recission, dmgs.	Violation of act by offeror, $500 fine, imprisonment up to 5 years.
Ohio	Withdrawal w/i 7 days.	Pro rata w/i 10 days.	No provision.	None.	Off'r subject to liabilities & penalties; offeree entitled to remedies of purchaser.	No provision.
Va.	Deposit at least 21 days--not more than 35 days; withdrawal first 21 days--after 35 days.	Pro rata during deposit time.	X	X	Express cause of action--recover shares, dividends, attorneys' fees.	Fine only.
Hawaii	Deposit at least 21 days--not more than 35 days.		X	None.	Express cause of action--recover shares, dividends, attorneys' fees; also common law remedies.	Fine or imprisonment.

Transcript of March 30, 1977, TRO Hearing:

In the United States District Court
for the Northern District of Texas
Dallas Division

Civil Action No. CA 3-77-0405

[Title Omitted in Printing]

BE IT REMEMBERED that commencing on March 30th, 1977, the following proceedings were had in the above entitled and numbered cause, before Honorable ROBERT M. HILL, United States District Judge in and for the Northern District of Texas, at Dallas, Texas.

[2] APPEARANCES:

HON. IVAN IRWIN, JR. and
HON. A. B. CONANT, JR. and
HON. JAMES V. GREVELLE, JR. and
HON. ROBERT B. COUSINS, JR. and
HON. BRETT RINGLE
For the Plaintiff

HON. JAMES KAUFMAN
For the State of Idaho

HON. PETER HEISER, JR.
For the Defendant WAYNE L. KIDWELL

HON. DICKEE HOWARD GOODMAN
For the Defendant FRANCIS B. BURCH

HON. MARK MARTIN
For Sunshine Mining Corporation

HON. ROBERT JUCEAM
For Sunshine Mining Corporation

[3] PROCEEDINGS

MARCH 30, 1977

9:04 A.M.

• • •

Transcript of March 30, 1977, TRO hearing:

Statements by James P. Kaufman, Assistant Attorney General of Idaho

[25] • • •

[Mr. Kaufman:]

After three or four days of analysis of the papers filed with the State of Idaho, our administrator decided that not all of the facts had been materially disclosed. There were certain facts missing and there was a matter of an exchange of $200,000 made after the tender offer going back to former shareholders that upset the State of Idaho.

So, that prompted the State of Idaho to issue its letter of comment asking for this information.

THE COURT: When did he do that?

[26] MR. KAUFMAN: That was on Friday the 25th of March, I believe.

The Director further ordered that the tender offer be effectively delayed until this matter was cleared up.

We believe it is important that the activities of Great Western be stopped for the moment not only in Idaho but all over the country because there are, of course, public investors in other states and to prevent them from operating in Idaho but allowing them to go to the other states would seriously jeopardize the position of the Idaho shareholder.

Great Western has mentioned that it will accept up to two million shares from the shareholders. After that, it's first come, first serve basis. So, obviously, if they can go out of state, the Idaho shareholders will be left with virtually nothing.

THE COURT: Under your Act you can enjoin them from—

MR. KAUFMAN: That is correct, Your Honor. Under our Act we may summarily issue the order delaying the effective date of registration until such time as it has been materially dis- [27] closed. All we're interested in is seeing that the shareholders get a fair deal.

THE COURT: This was a letter of comment from the Director and what was the purpose for that letter?

MR. KAUFMAN: That is correct, Your Honor. That letter asked for certain items that our Administrator felt were missing. In that letter I believe we state—

THE COURT: That was addressed to Great Western here in Dallas?

MR. KAUFMAN: That is correct, that is one of their exhibits.

• • •

[29] • • •

THE COURT: I was curious as to whether or not the Director there reviewed the disclosures made under the Williams Act to see if they complied with the disclosure requirements under the Idaho law.

MR. KAUFMAN: Yes, Your Honor.

THE COURT: We didn't think that they did comply; is that correct?

[30] MR. KAUFMAN: Not by the Idaho disclosure requirements. We, of course, don't enforce the SEC disclosure requirements.

THE COURT: I understand, but you're interested in your stockholders there in Idaho obtaining full disclosure and I was curious as to whether or not Idaho felt that the disclosure under the Williams Act were sufficient to comply with the Idaho law.

MR. KAUFMAN: We do not, Your Honor.

THE COURT: You do not think so?

MR. KAUFMAN: No, sir.

THE COURT: Thank you.

MR. KAUFMAN: Anyway, we can file the letter of intent and the Order delaying effective registration pursuant to Idaho law, which allows a director to do this summarily until such time as requested disclosures are made.

Then, Monday morning—

THE COURT: The effect of the Order was to delay the registration in Idaho; is that correct, until this information was furnished?

MR. KAUFMAN: That is correct, Your Honor. Under the Idaho law, I believe that the registration was delayed anyway because it's not [31] effective until approved.

THE COURT: Let me ask you about the approval.

Are there any deadlines on the approval or is it just subject to the discretion of the appropriate regulatory agency there in Idaho?

MR. KAUFMAN: Your Honor, there's a twenty day deadline if the State or the target company wishes to call a hearing and have an independent hearing to decide the

merits of the matter or decide whether or not there's been full disclosure. The hearing must be held within twenty days of the filing. It's a requirement to prevent the states from bureaucratically delaying the proceedings.

We did not want the twenty day period to run until their filing with us was complete. In other words, our raiding company could just file with us a piece of paper and not tell us anything and then the twenty day period would run while we're going back and forth trying to get them to file something. So, we wanted to prevent that twenty day period from running on us until they filed with us everything that they feel was complete.

[32] We indicated to them that if they did not file that we would like to have this information as stated in our letter of comment in addition to what they had already filed.

If they did not want to give us that information then we were prepared to call for a hearing to see if the hearing officer could determine that material. If the hearing officer found that what they had disclosed was proper and Idaho was asking for too much, then so be it.

THE COURT: Now, assuming he's ruled the other way, what would be your remedy there in Idaho?

MR. KAUFMAN: Well, we could deny the offer if it was determined that the raiding company had not materially disclosed all of the essential terms of the tender offer and what they intended to do with the company after they took it over. The State of Idaho has the authority to deny it.

* * *

[35] * * *

THE COURT: How do you interpret this? It says, "The purchaser presently intends to commence the proposed offer as soon as practi- [36] cable after it becomes effective under the Idaho takeover law and the requirements of other state takeover laws, if any, which are applicable to the offer are met or it is approved by the company's board of directors."

MR. KAUFMAN: Well, Your Honor, of course, under the corporate takeover law, if it's approved by the board of directors of the company, then they're exempt from the law.

But also under our law and I think these other state laws, they cannot complete or make a tender offer until it's been approved. So, technically, they can't commence it until it's been approved. They sort of have to announce it to the target company and to the public shareholders, but they can't really commence until it's been approved.

They stated that they're going to come to Idaho. They have come to Idaho and filed this with us. They filed it with the SEC.

* * *

Transcript of March 30, 1977, TRO hearing:
Statements by Peter E. Heiser, Jr., Chief
Deputy Attorney General of Idaho

[40] * * *

But, Your Honor, we do have in Idaho some threshold problems.

I think in the first case, Your Honor will be able to understand from the four corners of the Complaint that

although Attorney General Kidwell of the State of Idaho is named as a party defendant, it's done on the basis of speculation that he might have to enforce the law rather than the fact that he has ever in this case done a thing.

THE COURT: He's done nothing up to this point?

MR. HEISER: That's correct. He's vacationing in Death Valley right now. He does not even know there is a case.

THE COURT: Let me ask you this, Mr. Heiser: What could he do?

MR. HEISER: He does have concurrent jurisdiction under the Takeover Act to take action [41] under the Idaho takeover law. He has jurisdiction to bring a court action.

THE COURT: To enforce the law?

MR. HEISER: Yes, sir.

* * *

[42] * * *

These people came to Idaho to submit themselves to the jurisdiction of the Idaho Department of Finance, to file a registration under [43] our take over law.

THE COURT: They had to do that.

MR. HEISER: They had to do that to comply with our law.

However, they did not have to do that if they wanted to challenge our law.

They could have very simply come up to Idaho to our Federal District Court and brought their action under the Williams Act for challenging the Williams Act conflict with our state law in Federal court. They did not have to com-

ply with our law if they wanted to challenge our law. They could have come up there and attacked it there.

THE COURT: How would they have challenged the New York-Maryland law?

MR. HEISER: They would have to go to New York and Maryland to do it.

* * *

[44] * * *

THE COURT: Let me ask you if you think that the Idaho laws would have any effect on Great Western here in Dallas whether they came up there or not? Let's assume they didn't come up to Idaho.

Do you think your law might have an effect on them here in Texas? They're headquartered here. They desire to make a tender offer.

MR. HEISER: If they made a tender offer and refused to comply with the Idaho law and did not make their tender offers in the State of Idaho, I don't see how we could assert extra-territorial jurisdiction on them. If they ignored Idaho, Idaho shareholders completely, we're out of the ballpark.

[45] THE COURT: Couldn't you sue them in Idaho and obtain jurisdiction over them there if they are making a tender offer to your stockholders?

MR. HEISER: Yes, then they would be transacting business in the State of Idaho.

THE COURT: Let me ask you to turn it around. You say you can't make a tender offer, you in Texas can't make a tender offer to our people in Idaho.

Do you think you're transacting business in Texas?

MR. HEISER: Absolutely not. We are telling the people in Texas that you cannot affect by your actions in

your tender offer the shareholders in Idaho and particularly under the circumstances here.

THE COURT: You're telling them they can't make a tender offer anywhere, in effect, aren't you, if you don't satisfy the Idaho—

MR. HEISER: If they don't satisfy the Idaho law that they cannot make a tender offer.

THE COURT: In New York or anywhere?

MR. HEISER: Yes.

THE COURT: All right. Do you think you're [46] having an effect, some effect on Great Western here in Dallas?

MR. HEISER: Certainly we are once they have somehow triggered our ability to assert jurisdiction over them.

THE COURT: I think they admit you'd have jurisdiction over them up there if they sent tender offers to the stockholders, wouldn't be much question in my mind.

So, you've got this threatened jurisdiction over them and now you've issued a letter sent a letter down here to to Dallas to them, I think last Friday, saying unless you comply with our disclosure requirement you're not going to be approved in Idaho.

Now, do you think all of this encompasses some effect of Idaho law on them, these Texas people?

MR. HEISER: Certainly it affects these Texas people, Your Honor.

* * *

[48] Now, do you stay that there's not minimal contacts?

MR. HEISER: We contend that there is not minimal contacts with the State of Texas that would subject the State of Idaho to the jurisdiction of this Court here. Cer-

tainly, we would have a different situation were this action brought in the State of Idaho.

THE COURT: Could the Attorney General initiate proceedings in Idaho without some request by Mr. McEldowney, Director of the Idaho Department of Finance?

MR. HEISER: We have a dual role in enforcing this. We can legally, yes. As a practical matter, no, won't be done except upon recommendation.

THE COURT: Legally, the Attorney General could initiate these on his own?

MR. HEISER: That is correct.

• • •

Transcript of March 30, 1977, TRO hearing:
Statements by Dickee Howard Goodman,
Assistant Attorney General of Maryland

[72] • • •

THE COURT: What action could you take, Ms. Goodman?

[73] MS. GOODMAN: Well, we could go into court and ask for an injunction if they have not filed under the Maryland takeover statute which would, in effect, preclude them from making the tender offer in Maryland.

THE COURT: What about making the tender offer outside the State of Maryland? Does your law encompass the jurisdiction of the state courts to do that, to restrain the tender offer because it's not being made to Maryland residents or Maryland stockholders?

MS. GOODMAN: Well, the Maryland Securities Act, no.

The Maryland takeover statutes provide that an offeror may not make a takeover offer involing the target company, et cetera, et cetera, at a time when an administrative or injunctive proceeding has been brought by the Commissioner against the offeror. It's a violation of our statute which seems to indicate to me in the event Maryland did take action there would be extra-territorial implications.

• • •

Transcript of April 8, 1977, jurisdiction and venue hearing:

In the United States District Court
for the Northern District of Texas
Dallas Division

Civil Action No. CA 3-77-0405

[Title Omitted in Printing]

BE IT REMEMBERED that commencing on April 8th, 1977, the following proceedings were had in the above entitled and numbered cause, before Honorable ROBERT M. HILL, United States District Judge in and for the Northern District of Texas, at Dallas, Texas.

[2] HON. A. B. CONANT, JR. and
HON. JAMES V. GREVELLE, JR. and
HON. BRETT RINGLE and
HON. DREW HEARD and
HON. BRETT RINGLE
For the Plaintiff;

HON. JAMES KAUFMAN
and
HON. PETER HEISER, JR.
For State of Idaho;

HON. DICKEE HOWARD GOODMAN
For Defendant FRANCIS B. BURCH

HON. AMY JUVILER and
HON. WILLIAM S. DUGAN
For State of New York

Transcript of April 8, 1977, jurisdiction and venue hearing:

Stipulations

[03] * * *

MR. CONANT: It has been stipulated by and between the parties that the Defendants Kidwell and McEldowney in their personal capacities are citizens of the State of Idaho. That the Defendant Lefkowitz in his personal capacity is a citizen of the State of New York. That the Defendant Burch and Polovoy in their personal capacities are citizens of the State of Maryland. That none of the [04] Defendants are citizens of other states.

It has further been stipulated that there is an amount of at least $10,000.00 in controversy between Plaintiff and these Defendants.

It has further been stipulated that the Order of the United States District Court for the Southern District of New York entered on April 5th, 1977 staying the depositions of certain employees of the office of the Attorney General in New York, together with an Affidavit seeking that stay may be admitted.

Your Honor, we have marked such Order and Affidavit as Plaintiff's Exhibit 2 in light of the Plaintiff's Exhibit 1 which was introduced at the prior hearing. I am sorry I don't have a better copy. It's a tele copy version of that Order.

THE COURT: That's the Order?

MR. CONANT: Yes, sir, the Order and the Affdivit submitted with it.

THE COURT: 2 will be admitted.

[05] MR. CONANT: The parties have stipulated as to the admissibility of the 10K of Sunshine Mining Com-

pany with the following proviso; that the Idaho, Maryland and New York Defendants do not consider the statements made in the 10K determinative of the jurisdiction an applicability of their respective state take-over acts. By that I understand them to mean that they do not understand the 10K or do not concede that the 10K establishes Sunshine's principal place of business or where it may have substantial assets.

THE COURT: Have you got that exhibit?

MR. CONANT: Yes, Your Honor, we do.

THE COURT: Have you marked it?

MR. CONANT: Your Honor, this is the—we have now marked Plaintiff's Exhibit 3, the Sunshine Mining Company Form 10K for the fiscal year ended December 31, 1975, which was filed with the SEC on March 30, 1976.

(Plaintiff's Exhibit Number 3
was marked for identification.)

I believe there is a later 10K which has been filed just within the last few days for Sunshine but I don't believe any of the Defendants as yet have a copy of that.

[06] THE COURT: All right. As stipulated, 3 will be admitted.

MR. CONANT: Your Honor, it has further been stipulated that Sunshine Mining Company is a company having a class of securities for the tender offer for which—over the tender offer for which the Williams Act applies. Your Honor, it has further been stipulated between the Idaho Defendants and the Plaintiff that the Idaho Order, Administrative Order, was attached as Exhibit C to the Complaint and a copy of which I believe was given to the Court

at the prior hearing, but according to the transcript was not marked as an exhibit. Correct me if I'm wrong. I could better refer to it—

MR. HEISER: I believe that they were marked but with the markings that you used on your Complaint so they were not marked as exhibits for the record.

MR. CONANT: All right. Then, Your Honor, just to straighten out the record, we'll mark and introduce that item.

THE COURT: Number 4.

(Plaintiff's Exhibit Number 4
was marked for identification.)

[07] MR. CONANT: All right.

(Plaintiff's Exhibit Number 5
was marked for identification.)

This stipulation then is that the Order which we have now marked as Plaintiff's Exhibit 5, and I'll refer to 4 in a minute, which provides among other things for hearing after filing of a registration statement, was issued without notice or hearing as provided by the Act. GWU, after its issuance and prior to the filing of this Act, does not ask to be heard. GWU has not made any of the disclosure or supplied any of the information used in the Order or the Idaho Comment Letter which we have now marked and tendered to the Court as Plaintiff's Exhibit Number 4.

THE COURT: Did that letter accompany the Order?

MR. CONANT: They were dated the same day and I believe it did accompany the Order. Yes, Your Honor.

THE COURT: If this the letter that was mailed to Great Western?

MR. CONANT: Excuse me, sir?

THE COURT: Was this the letter that was mailed to Great Western?

[08] MR. CONANT: Yes, Your Honor. First telecopied and subsequently mailed.

THE COURT: All right.

[09] MR. CONANT: Continuing with the stipulations between the Idaho Defendants and GWU, that GWU has principal executive offices in Dallas, Texas.

GWU's representatives came into Idaho on March 21, 1977, and in person filed with the Idaho Director of Finance a registration statement under the Idaho Takeover Act and conferred with the Director's staff. The statement filed by GWU listed GWU's address as in Dallas, Texas.

The letter of the office of the Idaho Director of Finance dated March 25th, 1977, which is now Exhibit 4—

THE COURT: That's No. 4.

MR. CONANT: —was addressed to Steven Metzger and was addressed to GWU in Dallas at GWU's request.

GWU made no reservation of rights with respect to or has received any claim of validity in the Idaho Act of the Schedule 13(D) or statement in the filing with the Idaho Director.

GWU has not sought any determination from Idaho State Courts or agencies with respect to the validity or constitutionality of the Idaho Act. GWU has not brought or sought to bring this action in any Federal Court in Idaho, New York or Maryland.

[10] Those stipulations between the Idaho Defendants and GWU were made without prejudice to arguments concerning relevance and materiality of the stipulations.

THE COURT: All right.

MR. CONANT: Your Honor, we on the break sought to arrive at other stipulations, but for a variety of reasons were unable to do so. I think that concludes the stipulations between the parties.

THE COURT: Is that so stipulated? Let me ask Idaho first. Mr. Heiser?

MR. HEISER: Yes, Your Honor.

THE COURT: New York?

MS. JUVILER: I have two comments. They have to be clarified. While we conceded that there would be $10,000.00 in controversy, it was stipulated only if there was determined to be a controversy between the parties.

THE COURT: All right. That will be added to the stipulation.

MS. JUVILER: The stipulation as far as the 10(k) in addition to the fact it did not determine the jurisdictional facts as far as the New York Statute was concerned, we also stipulated it in [11] only as to its relevance to jurisdictional facts such as where the locale of the assets and activities of Sunshine Mining were.

THE COURT: All right. Thank you.

Maryland?

MS. GOODMAN: The stipulation is agreed to.

• • •

Transcript of April 8, 1977, jurisdiction and venue hearing:

Testimony of Milton G. Strom, witness on behalf of Plaintiff—Direct examination

[19] • • •

MILTON STROM,

called as a witness by the Plaintiff, being first duly sworn testified on his oath as follows:

DIRECT EXAMINATION

BY MR. CONANT:

Q Will you state your full name, please, sir?

A Milton G. Strom.

Q Mr. Strom, how are you employed?

A I'm a partner in the New York law firm of Skadden, Arps, Slate, Meagher and Flom.

THE COURT: Give us that slower, will you please?

THE WITNESS: Skadden, Arps, Slate, Meagher, which is spelled, by the way, (spelling) M-e-a-g-h-e-r, and Flom, (spelling) F-l-o-m.

THE COURT: Proceed.

[20] Q (By Mr. Conant) Are you licensed to practice in New York, Mr. Strom?

A Yes.

Q Are you licensed to practice elsewhere?

A No.

Q You and your firm acted as Special Counsel for Great Western United Corporation in respect to its proposed tender offer for shares of Sunshine Mining Company?

A Yes, sir, yes, we have.

Q In connection with that employment have you had occasion to discuss with the New York Attorney General's office the question of whether of not the New York State Take-Over Act would apply to the tender offer of Great Western?

A I have had a couple, a number of phone calls with the New York Attorney General's office.

Q All right, sir. Was the general subject matter of those telephone calls whether or not New York would assert jurisdiction?

MS. JUVILER: Object to that question as leading.

THE COURT: As being leading?

MS. JUVILER: Yes, Your Honor.

THE COURT: I think it is leading. Sustained.

[21] MR. CONANT: All right.

Q (By Mr. Conant) What was the nature of those telephone calls, Mr. Strom?

A Well, as I recall there were a number of preliminary and sort of mechanical phone calls which would have been on Monday and Tuesday which would have been March 21 and March 22. We had—our firm had submitted a memorandum to the Attorney General and we had concluded that there was not jurisdiction. I had been speaking with, and other members of my firm had been speaking with Mr. Martin Weber as to when we could come down and see the Attorney General after they had finished reading the memorandum.

Q All right.

MRS. JUVILER: Object to that answer in the following respect, Your Honor. The characterization of telephone calls as mechanical. I object to the hearsay as to

other members of my firm had been speaking to persons in the Attorney General's office, and the subject matter of other people's conversation, and I object to the characterization that the law firm in presenting a brief had itself concluded that there was no jurisdiction rather than they presented the argument on behalf of their client; that their [22] client claimed there was no jurisdiction.

THE COURT: I'll sustain the last portion of your objection, the conclusion on the part of the law firm, but otherwise it would be overruled.

MRS. JUVILER: May I have an exception?

THE COURT: Yes. Everybody has an automatic exception in the Court's actions if they feel that they're prejudiced by the Court's action. Thank you. Go ahead.

Q (By Mr. Conant) Mr. Strom, the documents that your firm had presented, had it taken the position that the New York State Take-Over Act did not apply to the Great Western Tender Offer?

A That's correct.

Q Were your personal conversations with the office of the New York Attorney General's office, New York Attorney General, with Mr. Weber?

A Yes.

THE COURT: When did you talk with him now, approximately?

THE WITNESS: I believe on Monday and Tuesday of that week, which would be March 21 and March 22. I had a brief conversation with Mr. Weber as—solely for the purpose of seeing when we might be able to see either him or someone in the Attorney [23] General's office.

Q (By Mr. Conant) All right. Did you speak with Mr. Weber after those two phone calls?

A The afternoon of March 24 I received a phone call after the phone call was initially directed to my partner, Mr. Pirie, who was out of the office, and the phone call was transferred to me. The phone call was from Mr. Weber. Mr. Weber informed me that—I don't remember—

THE COURT: He's just really asked if you had—just asked if you had a conversation. That was the 24th?

THE WITNESS: That was the afternoon of the 24th.

THE COURT: Thank you.

Q (By Mr. Conant) And what did Mr. Weber say to you in that telephone conversation?

A Mr. Weber said that his office either, I don't remember his exact language, but it had either concluded or believed that there was jurisdiction under the New York Security Take-Over Disclosure Act over the proposed Tender Offer by Great Western for Sunshine. I went on to—he went on to state that they recommended that the registration statement which would be required by that statute be filed as soon as possible [24] and that the Attorney General's office had no intention of unduly delaying the offer. He went on to state that it was unlikely that the Attorney General's office would conduct a hearing. He said he also thought it was unlikely that they would conduct an investigation but that perhaps that was a little more likely than here. I objected to the assertion of jurisdiction. That's—I did not think it was appropriate under the circumstances. I asked him the basis for the jurisdiction. He would not tell me, and the conversation terminated.

Q (By Mr. Conant) Mr. Strom, do you have any notes made contemporaneously with that telephone conversation?

A Yes. It's my general practice—

THE COURT: You do have some notes?

THE WITNESS: Yes, I do.

THE COURT: He does.

Q (By Mr. Conant) And do you have those with you?

A Yes, I do.

THE COURT: 6 is your next one. He's got a 5. 5 is the Idaho Order and the letter is 4.

(Plaintiff's Exhibit Number 6
was marked for identification.)

Q (By Mr. Conant) Mr. Strom, I hand you what [25] I've now marked as Plaintiff's Exhibit 6 and ask whether this is the notes to which you referred?

A Yes.

Q These are notes made by you?

A These are notes made by me during the course of my conversation with Mr. Weber on the afternoon of March 24.

Q All right.

MR. CONANT: Your Honor, we offer Plaintiff's—

THE COURT: You've used those to refresh your memory here today?

THE WITNESS: Yes.

THE COURT: Thank you. Go ahead.

MR. CONANT: Your Honor, we offer Plaintiff's Exhibit 6.

MS. JUVILER: Your Honor, I'd like to voir dire as to where these notes were kept between March 24 and the present time.

THE COURT: Proceed.

VOIR DIRE EXAMINATION

BY MS. JUVILER:

Q Can you describe where you kept this note, Mr. Strom?

A That note was kept with my other papers on [26] this—relating to this matter.

Q Where was that, Mr. Strom?

A It was in my office and in my brief case.

Q Where did you keep this note in your office?

A It was kept on top of my desk in a pile with various other documents relating to this matter.

Q There is no date on this, on this note. How did you know that it was made on March 24th?

A You're right. There is no date on the note. But that was the conversation that I had with Mr. Weber on the 24th, and you will just have to take my word for it that it was on the 24th.

Q Do I understand you to say, then, that you didn't need these notes to refresh your recollection because these notes told you this is the conversation I had on the 24th? You remember the conversation without referring to the notes, is that correct?

A Well, I remember the conversation without referring to the notes but I did use the notes to refresh my recollection. I can't say that I remember one hundred percent of the conversation without having reference to the notes.

MS. JUVILER: We have no objection to the—to this being offered.

THE COURT: All right. Anyone else object? [27] We'll admit it if there are not other objections.

MR. HEISER: No objection.

THE COURT: Thank you.

MS. JUVILER: Your Honor, may I have leave to make a copy of that exhibit or any other that we don't have?

THE COURT: Yes. You're entitled to a copy of all those exhibits and particularly this one. The Rules entitle you to a copy of anything that he uses to refresh his memory.

[28] MR. CONANT: Your Honor, this is a very brief note, and just to remove any questions about whether any of us can read Mr. Strom's writing, may I ask him to read this for the record?

THE COURT: I think the Rules provide the note itself is not admissible in evidence, but it may be read.

MR. CONANT: Okay.

Q. (By Mr. Conant) Would you read the note to us, Mr. Strom?

MS. JUVILER: May I look over his shoulder as he reads it, Your Honor?

THE COURT: Yes, you may, then look over his shoulder.

THE WITNESS: Right shoulder or left shoulder?

A. This is on a note pad that I generally use for making notes of this kind. It says at the top, "From Milton G. Strom." There is two double lines below that. It says, "To."

Then there was the words "Martin Weber." Then there is a line. Below that it says, "There is jur," (spelling) J-U-R. Below that it says, "Time table—file as soon as possible—."

Then there is a little squiggle which I use to represent the word "not," so that would read "Not [29] intend to hold it up." That is underlined. Below that it says,, "Public hearing," there is another little squiggle which means not, "not likely." The last two words are underlined.

Below that there is the word "Fee," which in my shorthand means "could." That reads "Could conduct an investig," which is short for "investigation."

There is a dash. Again there is a little squiggle which means "not." It says, "Not likely but more likely."

That's the extent of the notes.

Q. (By Mr. Conant) Mr. Strom, since contacting the New York Attorney General's office have you subsequently heard, indirectly, by rumor or otherwise that perhaps the New York Attorney General's office has not decided whether or not to take jurisdiction?

A. I have had no direct conversations with the Attorney General's office since that time. However, I have heard—

MS. JUVILER: I object, Your Honor.

THE COURT: What is the basis of your objection?

MS. JUVILER: It's that it is hearsay.

THE COURT: I'll sustain it.

Q. (By Mr. Conant) Have you had any direct [30] contact with anyone from the New York Attorney General's office stating that the New York Attorney General's office would not take jurisdiction under its State Takeover Act?

A. Excuse me, have I had conversation with whom?

Q. With anyone at the New York Attorney General's office to the effect that that office would not take jurisdiction under the State Takeover Act?

A. No.

MR. CONANT: Pass the witness.

THE COURT: Cross exam, Mr. Heiser?

MR. HEISER: None from Idaho.

* * *

Transcript of April 8, 1977, jurisdiction and venue hearing:

Deposition testimony of Norman Polovoy, witness on behalf of Plaintiff — Direct examination

[46] * * *

MR. CONANT: Your Honor, this was a deposition of Mr. Polovoy taken on April 5, 2:15 p.m., at [47] 1000 Maryland National Bank Building in Baltimore, Maryland. Page 4, line 7, questioning was by Mr. Rule of my office.

"I would also state that Mr. Polovoy—correct me if I pronounce your name wrong—is appearing here by agreement today.

ANSWER: Certainly.

QUESTION: Mr. Polovoy, would you please state your full name for the record?

ANSWER: Norman Polovoy.

Going to line 17.

"QUESTION: What is your occupation, Mr. Polovoy?

ANSWER: I am an attorney and presently occupy the position of State Securities Commissioner.

Going to Page 5, Line 18.

THE COURT: Where did you end off there?

MR. CONANT: That went to, excuse me, Your Honor, that went to Line 19, page 4. The first quotation did. Next is page 5, line 18.

"In your capacity as the Commissioner of Securities, are you empowered with the right to administer and enforce the Maryland Corporate Take-Over Law?

ANSWER: To the extent provided for by [48] statute, yes, with the aid and assistance of the Courts where required. I'm not trying to dodge your question, I'm just trying to say yes, obviously with the Court's sanctions, where necessary."

On page 12—

THE COURT: Where did you end off there?

MR. CONANT: That was—

THE COURT: Page 6?

MR. CONANT: Page 6, line 5.

THE COURT: Give us the ending place as well, Mr. Conant.

MR. CONANT: All right, sir. Next beginning at page 12, line 21,—with me, Ms. Goodman?

MS. GOODMAN: Yes, sir.

MR. CONANT: "Mr. Polovoy, have you been able to determine whether or not the proposed Great Western Tender Offer shares of Sunshine Mining Company comes within the jurisdiction of the State of Maryland and the Maryland Corporate Take-Over Law?

ANSWER: No, I have not been able to determine that.

QUESTION: And you have not been able to make that determination both after reading the [49] position papers at Great Western and Sunshine Mining?

ANSWER: Yes, there was no evidence of the alleged facts contained in the statement given to me by Great Western nor the statement given to me by representatives

of Sunshine and from those two statements I have not been able to make any determination.

QUESTION: Is it a true statement, Mr. Polovoy, that you have stated an intention to call a hearing to determine the jurisdiction of the Maryland Statute?

ANSWER: No, that is not. I have indicated to both parties that I would be willing to have a hearing if any party requested it on the jurisdictional issue, whether or not Maryland has jurisdiction, but on my own volition I have not at any time indicated that I intended calling a hearing."

That took us, Your Honor, to page 14, line 1. Moving to page 19, beginning at line 3:

"QUESTION: Yes, sir. Does the Maryland Corporate Take-Over Law apply to a friendly tender offer, that is, a tender offer in which it is approved by incumbent management?

[50] ANSWER: I have just been referred to Section 11901, sub-section H which deals with the definition of a take-over offer, sub-paragraph 2-V in which it would appear that the take-over statute would not be applicable if the offer is made to all stockholders on substantial equal terms and then it goes on. Also, if the target company, if the offer to the target company acting through its Board of Directors recommends acceptance to its stockholders. That would seem to indicate that it is not applicable to a so-called friendly take-over offer."

That ended at page 19, line 16. At page 20, beginning at line 13—no, excuse me, Your Honor. I don't need to read that. Page 21, beginning at line 3:

"QUESTION: Would you please look at what has been marked as Plaintiff's Exhibit Number 3, Mr. Polovoy?

ANSWER: Yes.

QUESTION: Is Plaintiff's Exhibit Number 3 a complete copy of the Regulations adopted under the Maryland Securities Act, to date?

ANSWER: Correct."

Your Honor, I think we neglected to ask the [51] Court in the earlier hearing to take judicial notice of the Maryland Regulations. We have a copy here that Mr. Polovoy has just identified in his deposition which we'll mark as Plaintiff's Exhibit 7, if that's all right.

(Plaintiff's Exhibit Number 7
was marked for identification.)

MR. CONANT: Continuing on page 21, oh, that quotation took us to line 9,—

THE COURT: Page 21?

MR. CONANT: Page 21, line 9, yes, sir. Now, we're skipping to page 21, line 15.

"QUESTION: Mr. Polovoy, in your opinion, does the Maryland Corporate Take-Over Law purport to apply extra-territorily so as to prohibit a tender offer from going forward in any state until and unless requirements of the Maryland Act have been complied with?

ANSWER: I think the answer would be yes, provided that the Commissioner first makes a determination that the target company, as that definition is used in the Act, is in Maryland and that Maryland does have jurisdiction."

That took us to page 22, line 2. At page 23, this will go from lines 8 through line 14:

[52] "QUESTION: Mr. Polovoy, to your knowledge, have there been any judicial interpretations of the Maryland Corporate Take-Over Law?

ANSWER: There have not been any.

QUESTION: Is there any pending litigation in the State of Maryland interpreting the Act?

ANSWER: Not in the State of Maryland, no."

Last, Your Honor, page 32, lines 3 through 16:

"QUESTION: Would you agree that it would be very difficult for a company considering making a tender offer in reading your statute in connection with that consideration to decide whether or not, decide what substantial portion of assets in the state would mean?

ANSWER: It would certainly not be entirely free from doubt, but I think a company with knowledgable counsel and with knowledge of all of the relevant factors I think could help the company make that type of determination.

QUESTION: But they could never be safe, would they, Mr. Polovoy, without coming to the Commissioner of Securities?

ANSWER: Never completely safe, that is correct; never completely safe."

That's all we have from that deposition, Your [53] Honor, and we offer what was identified in Mr. Polovoy's deposition as Exhibit 3 to that deposition. We have now marked that as Plaintiff's Exhibit 7, being the Rules and Regulations of Maryland.

THE COURT: Any objection to the Regulations?

MS. GOODMAN: I would request, Your Honor, that the complete deposition of Mr. Polovoy be introduced into evidence. Was that your intention?

THE COURT: No. He doesn't, but I will consider it all offered.

MS. GOODMAN: I would appreciate it.

MR. CONANT: I have no objection.

THE COURT: He has no objection so I'll consider the entire deposition.

MS. GOODMAN: Thank you, Your Honor, and I'd like to just follow through for the record on page 13 where it says, "Is it a true statement, Mr. Polovoy, that you have stated an intention to call a hearing to determine jurisdiction in the State—of the Maryland Statute?

No, that is not. I have indicated to both parties that I would be willing to have a hearing if any party requested it on the jurisdictional issue, whether or not Maryland has jurisdiction, [54] but on my own volition I have not at any time indicated that I intended calling a hearing." And I refer now to page 14.

THE COURT: Where did you end there?

MS. GOODMAN: I beg your pardon?

THE COURT: Where did you end?

MS. GOODMAN: I'm sorry. Page 13.

THE COURT: Okay.

MS. GOODMAN: Page 4—It was line 14 through 21.

THE COURT: Thank you.

MS. GOODMAN: And I would like to call and put into the record the statement that was not read by Counsel, and that is on page 14, line 2.

"QUESTION: Has anyone requested that you call a hearing on that issue?

ANSWER:"

On line 4. "No, no one has requested it."

THE COURT: Now, you also want me to consider the rest of the deposition as well?

MS. GOODMAN: Yes, if it pleases the Court.

THE COURT: Okay. I'll consider the rest as well. 7 will be admitted, the Regulations.

MR. CONANT: Thank you, Your Honor.

Transcript of April 8, 1977, jurisdiction and venue hearing:

Testimony of James R. Parish, witness on behalf of Plaintiff—Direct examination, Cross examination at p. 74, Redirect examination at p. 86

[63] * * *

JAMES R. PARISH

called as a witness by the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CONANT:

Q. State your name, please, sir.

A. James R. Parish.

Q. Mr. Parish, how are you employed?

A. I am employed by Great Western United Corporation.

Q. And in what capacity?

A. As Vice-President and Treasurer.

Q. How long have you been so employed?

A. Since May of 1975.

Q. What did you do prior to that time?

[64] A. I was a consultant for Great Western United for three months from February through May of 1975.

Prior to that I was employed with another firm in Denver, Colorado.

Q. Mr. Parish, in your capacity as an officer of Great Western United Corporation are you familiar with, generally familiar with its corporate affairs including its place of incorporation, the places where its stock is traded, where its principal offices and officers are located and the like?

A. I am.

Q. In what state is Great Western United Corporation incorporated?

A. Delaware.

Q. Is the stock of Great Western Corporation publicly held?

A. It is.

Q. And is it listed and traded on any exchange?

A. The common stock is traded on the New York Stock Exchange and the Pacific Stock Exchange. We have an additional issue of stock traded on the New York Stock Exchange.

Q. Where are the corporate headquarters of Great Western United?

A. I have to make a distinction here. There are [65] corporate offices in Denver, Colorado, but the executive offices and the location of the executive management of the company is in Dallas, Texas.

Q. Are the principal corporate officers resident in Dallas, Texas?

A. They are.

Q. Where are the principal books and records of Great Western United kept?

A. In Dallas, Texas.

Q. Is the majority, are the majority of the shares of Great Western Corporation owned by residents of Dallas, Texas?

A. They are.

Q. Are all of the Board members of Great Western United Corporation residents of Dallas?

A. They are certainly residents of Texas. I do not know if all of them are residents of Dallas.

Q. Mr. Parish, are you familiar generally with the proposed tender offer by Great Western for shares of the stock of Sunshine Mining Company?

A. Generally, yes.

Q. Are you aware that a press release was made by which that was initially announced publicly?

A. I am.

Q. Mr. Parish, let me show you what we have [66] marked as Plaintiff's Exhibit No. 9 and ask whether that is the press release to which we just referred?

A. Yes, sir, it is.

Q. This press release is dated March 21, 1977. To the best of your knowledge was that the date on which it was issued?

A. That's correct.

A. And additionally, to the best of your knowledge was this the first public announcement of the proposed tender offer?

A. Yes, sir.

• • •

[72] • • •

Q (By Mr. Conant) In response to your press release, Great Western press release, Mr. Parish, did the shareholders of Sunshine Mining Company have an opportunity to tender their shares to you?

A No, sir.

[73] Q When do you understand would be the first time when the shareholders of Sunshine will actually really have that opportunity?

A It's my understanding that until a notice of offered purchase is published or a booklet describing the offer to purchase is mailed to shareholders that they cannot tender and we cannot accept tenders of shares.

Q Has either of those two things occurred? By that I mean the publication of the notice or the sending of the offer to the shareholders?

A No, sir, that has not occurred.

Q In connection with the proposed Great Western tender offer have you secured or has Great Western secured a shareholder list of Sunshine Mines?

A We have.

Q Have you investigated that shareholder list to determine whether there are any shareholders who appear to reside in the State of Texas?

A I have, and there are at least 489 who are noted on the list as residing in Texas. There may be additional residents of Texas who own those shares but we have no way to tell from the list.

MR. CONANT: Your Honor, we have that whole shareholder list if there's any real objection to [74] it. It's about this high (indicating) and so if there are no substantial objections to that we will not offer it.

MS. JUVILER: Mr. Conant, could you ask one question of the witness to clear it up for us, and ask did he

look at—did he look at that list; will you just ask that one question to clarify that somebody did examine that box?

Q (By Mr. Conant) Did you examine that shareholder list personally?

A I did.

MR. CONANT: At my direction.

MS. JUVILER: And he doesn't wear glasses.

MR. CONANT: Pass the witness.

THE COURT: Thank you. Cross examine.

CROSS EXAMINATION

BY MR. HEISER:

Q Mr. Parish, I'd like to ask you if, in your examination of the shareholder list, you noticed whether or not there have—there were any shareholders listed as being in the State of Idaho?

A I'm certain that Idaho shareholders appear.

Q And you did see some on the list?

A I saw one or two.

• • •

[86] • • •

REDIRECT EXAMINATION

BY MR. CONANT:

Q. Mr. Parish, I think I neglected to ask where Great Western considers its principal place of business [87] to be?

A. In Dallas.

• • •

Transcript of April 8, 1977, jurisdiction and venue hearing:

Testimony of John S. Guest, witness on behalf of Plaintiff—Direct examination

[106] • • •

JOHN S. GUEST,

called as a witness by the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CONANT:

Q. State your name, please, sir.

[107] A. John S. Guest.

Q. And Mr. Guest, by whom are you employed?

A. I am employed by the firm of Kuhn, Loeb & Co., (spelling) K-U-H-N L-O-E-B, & Co., Incorporated, New York City.

Q. And in what capacity are you employed by Kuhn Loeb?

A. I am a managing Director and Treasurer of Kuhn, Loeb & Company.

Q. How long have you occupied that position?

A. Since February the 1st, 1977.

Q. And what did you do prior to that?

A. Prior to that I was a partner of the firm of Kuhn Loeb & Co., not incorporated.

Q. Do I understand, then, the change was really, not really your status, but in the nature of a type of entity that Kuhn Loeb was?

A. Yes.

Q. For how long were you a partner of Kuhn Loeb?

A. I was a partner for approximately fifteen years.

Q. And before that what were you?

A. I was an employee or associate as we call it from 1937 onwards with a break for war service.

Q. What is your educational background?

[108] A. I was educated in England at Cambridge University, and then attended the Harvard Business School.

Q. Are you a member of the New York Stock Exchange?

A. Yes, I am.

Q. And are you a licensed member of the New York Society of Security Analysts?

A. Yes.

Q. Tell us, if you would, what the nature of Kuhn Loeb's business is.

A. We are an investment banking firm, and the functions of our firm are arranging for capital issues by corporations, municipalities, and other entities in the United States and international markets, and the distribution of those securities to investors throughout the world. We also advise investers on the purchase and sale of securities for their own account.

Q. Do you also engage in the business of being a dealer manager in tender offers?

A. Yes, we do.

Q. And do you assist clients in arranging various sort of corporate financial transactions that may or may not involve capital issuance?

A. Yes. We provide general financial advice as well as advice related to actual transactions.

[109] Q. And has Kuhn Loeb since 1937 been involved in one way or other, been involved in tender offers?

A. Yes, we have.

Q. Are you familiar with what is called the Williams Act at least as it affects Kuhn Loeb's business and advice and relative to the market and like matters?

A. Yes, I am generally familiar with the Act as it affects our business.

Q. Likewise, have you in the course of your employment as a partner of Kuhn Loeb become generally familiar with what are called generically the State Takeover Acts as they affect the market and tender offers?

A. I am aware that there are Takeover Acts in certain states, and I am aware of their applicability to transactions.

Q. Have you become aware of the manner in which they affect a proposed tender offer?

A. Yes, sir.

Q. Have you observed—well, excuse me, strike that.

Am I correct in saying, to the best of your knowledge, that most of these State Takeover Statutes are recent in origin, that is within just the past eight years or so?

[110] A. That is the case as far as my experience is concerned.

Q. Have you, as an experienced observe of the market and the financial community, observed the effect or the impact of the State Takeover Acts on takeovers?

A. Yes, I have.

• • •

[114] • • •

Q (By Mr. Conant) All right. Mr. Guest, I believe just before the break you said that you had observed an

effect of the State Take-Over Acts on the course of tender offers generally. What is that effect or those effects?

A The principal effect as it affects security holders and the two companies involved, the offor and the target is to inject an element of delay. The first element of delay is to determine whether the management of the target company is in fact going to endorse the offer. If it does that perhaps maybe the limits of the delay and the offer then proceeds. If the management does not endorse the offer, the management has recourse to certain state authorities and state courts, and the company—the offor company and also the target company may well be uncertain as to whether in fact the particular transaction is subject to the jurisdiction of whatever Courts the target company has sought relief in. The effect of all of this is a compounding delay effect which becomes increased by the uncertainties because sometimes if you don't know whether the offer is subject to a state law a long time may elapse before you find out.

[115] Q Let's back up one step and ask what really is the purpose of a tender offer?

A The purpose I could analyze from a point of view of three parties, perhaps four. The first part is the offor who sees a corporate opportunity to employ either securities or in what we're talking about today, cash, to put it to good use for the benefit of his own stockholders. That is his purpose. From the purpose of the target company, it is a purpose of improving their operations, if, in fact, the offor is able to do so. From the point of view of the stockholders of the target company, it offers them an opportunity to dispose of their holdings at a price which will

normally be in excess of the previous prevailing price or perhaps even a price that they might expect to continue absent an offer. The fourth group is from the point of view of the management of a target company that produces in the offer, produces great uncertainties in their mind because of a change of control of the management of the target company if the offer is unsuccessful.

Q All right, sir. Let's—I think we both realize that there's a vast difference between tender offers that are made where the offor is offering securities and where it's offering cash, so for the [116] duration of our discussions, if we can, let's restrict it to just cash tender offer. All right, sir?

A Sure.

[117] Q. (By Mr. Conant) Well, in light of these purposes that you have given for a tender offer, from the offeror's standpoint and the other standpoints, what, then, in what way is that purpose or those purposes affected by the delay that is injected by the State Takeover Acts?

A. It means from the point of view of the offeror company that the funds he had committed or arranged for the proposed investment in the securities of the target company are in a sense locked up unless he chooses to abandon the project, and he is also unavailable to use those funds, or that credit for other corporate opportunities that may emerge during this delay period. So he is somewhat frozen and the ability of that company to manage its affairs is hurt.

Q. What is the effect then of—

THE COURT: Well, if he has borrowed those funds he has to pay the prevailing interest rate in the interim, is that correct?

THE WITNESS: Well, he may, sir. That varies as to whether he has to pay charge for the use of the funds, or whether he has other arrangements.

THE COURT: Do you know where you can get them without any charge?

THE WITNESS: There is no such thing as a [118] free lunch, Your Honor.

THE COURT: All right. Go Ahead.

Q. (By Mr. Conant) Actually, if an offeror is using its own cash that it has on hand, there is always a cost of capital, is there not?

A. That's what I think I meant.

Q. We may yet come back to the effects on the offeror, but what then are the effects of delay to the incumbent management of the target company?

A. The incumbent management of the target company can use this delay in several ways to obstruct the offeror to prevent it being revived. They can do it through litigation. They can do it through propoganda, and also they can do it by soliciting some other deal with another corporation or entity which might be more sympathetic to the incumbent management of the target company.

Q. Are there various, more or less, standard defensive tactics that can be employed by the incumbent management of a target company if they have time to do it?

A. Yes, there are.

Q. Can stock dividends be used as a defense mechanism?

A. That is one.

[119] Q. And have you known of inflated dividends, that is where the company declares a much larger dividend

during the interim period in order to discourage the shareholders from selling?

A. Yes, there are cases where that has happened.

Q. Is it generally regarded in the investment community that the delay in the effectuation of a tender offer really only inures to the benefit of the target company, the incumbent management of the target company?

A. I am not certain that I would say only to their benefit. Principally to their benefit. It is always possible that some third party during that delay period may emerge with an offer which in fact is more in the interest of the stockholders.

Q. When a cash tender offer is first announced what is generally the effect on the market for that stock?

A. The initial effect will be for the—may I start again?

Assuming that the tender price mentioned in the notice of intention which is filed with the SEC, if the price is higher than the prevailing market price, and this is the normal case in tender offers, after the market receives this news the quotations for the stock of the target company will be higher than they were be- [120] fore the tender offer was announced.

• • •

Q. (By Mr. Conant) Mr. Guest, at my request did you have done under your direction and control a chart made up on the stock prices of Sunshine Mining Company for the period immediately prior to the announcement of the Great Western proposed tender offer through the present?

A. Yes, I did.

Q. You have that with you?

A. Yes.

• • •

[121] * * *

Q. (By Mr. Conant) Mr. Guest, let me show you what we have now marked as Plaintiff's Exhibit 11 and ask whether that is the chart that was prepared by Kuhn Leob at your direction on the Sunshine Mining Company stock prices?

A. Yes.

MR. CONANT: Your Honor, we will want to introduce Plaintiff's Exhibit 11 and then testify further about it.

THE COURT: These are price fluctuations?

MR. CONANT: Yes, Your Honor, these are the prices, the daily high, low and closing prices from March the 15th through April the 6th of Sunshine Mining Company.

THE COURT: What exchange are we talking about?

THE WITNESS: These are the quotations in the Wall Street Journal. The New York Stock Exchange is the principal exchange, but it is a consolidated tape now, so it represents transactions on all exchanges.

THE COURT: Thank you. Is there any, other than your other objection, is there any additional objection?

[122] MR. HEISER: Your Honor, I would like to ask what the relevance of this is from counsel.

MR. CONANT: Your Honor, we think it is relevant to show the reaction of the market to this stock price, the effect of the delay not going forward with this offer, the deleterious effect on the shareholders themselves, and the effect that these state tender offers have on what is clearly a national market.

THE COURT: Okay. I'll admit it.

MS. JUVILER: Your, Honor—

MR. HEISER: The relevance objection is—

THE COURT: Yes, you have those continously.

MS. JUVILER: Well, Your Honor, this is a new piece of evidentiary material other than the witness himself, and we see no relevance on Mr. Conant's statement other than to the merits of the action. We think it is totally inappropriate in a hearing on jurisdiction and venue.

THE COURT: Overruled.

MS. JUVILER: And Mr. Conant had represented to us earlier that this was going to be very short testimony. May I inquire how much longer the testimony is going to continue on the merits?

THE COURT: I don't know. He is probably [123] getting close to the end.

MR. CONANT: I would imagine, yes, Your Honor.

[124] Q Mr. Guest, are you aware that the Hunt tender offer or the Great Western proposed tender offer was announced on March 21 of this year?

A Yes, I am.

Q Prior to that time in what general range was the Sunshine Mining Company stock traded?

A From the beginning of 1977 through March 17 the range was a low of eleven dollars per share and a high of fourteen and a half. That's $14.50 per share.

Q All right, sir. I notice on this particular chart the $11.00 figure does not—does not show. Is that something that you determined for yourself?

A This was an item I picked out of the paper myself this morning and entered on this document.

Q All right.

A The paper typically shows the high and low every year for every stock printed.

Q On the first trading day following the announcement of the proposed tender offer what was the stock price?

A On March 22 the stock price fluctuated between $15.75 and $16.00 a share.

MR. HEISER: Your Honor, we object. That is in evidence and it speaks for itself.

THE COURT: It does speak for itself. He [125] is just interpreting it, pointing out a few things on there he wants to emphasize and I'll let you do the same.

MR. CONANT: I'm not going to walk through all the figures.

THE COURT: Oh, please don't.

Q (By Mr. Conant) I notice on the second trading day that the stock traded at a high figure of sixteen and an eighth.

THE COURT: What date are you talking about?

MR. CONANT: That would be March 23, 1977.

Q (By Mr. Conant) Was that in fact a high for the year of Sunshine Mining Company?

A Yes.

Q The—are you aware that the announcement—

THE COURT: Let me ask, do you know how much the amount of the tender offer was?

THE WITNESS: Yes, sir.

THE COURT: How much?

THE WITNESS: It was announced that the tender offer price would be $15.75 if the management was not going along with the offer, but that there might be an offer of $16.75 with a concurrence of the management. I believe that's what I read in the announcement.

[126] THE COURT: Thank you.

Q (By Mr. Conant) Are you aware that it was on April 1st this year that it was publicly announced to the investment community that Great Western's tender offer had been enjoined by a Court in Idaho?

A I'm not entirely certain as to the date but I know it was approximately then.

Q Thank you. In any event, I believe April the 1st was on a Friday and in the succeeding week what has been the range of the stock prices?

A During the week commencing April the 4th the high level was $15.25 and the low point was $14.37 and a half cents.

Q Mr. Guest, in light of the fact that the proposed tender offer price was $15.75 how do we account for the fact that for—on at least some trading days the stock was actually trading at a price higher than that?

A This is a normal condition in tender offers and reflects the activities of a group of dealers acting for their own account who are known as arbitragers.

Q Tell us, if you would, briefly how the arbitrage system works in the context of a tender offer.

A A dealer, who is a member of the National [127] Association of Securities Dealers, in permitted in all of these tender offers to receive a fee from the offor or company in respects of shares tendered by that dealer.

Now, the payment of this fee can go to one of two groups of people. It can go to the local broker who in fact has contacted his client, the stockholder, and said I will take care of all the paperwork for you and I will send everything in to the company and you will still get the offer price and the dealer will receive a fee from the company

for his service. It does not come out of the stockholders' pocket. That is one group of people who are entitled to the sixty cents.

Now, the effect of the arbitrager is entirely different. The reason is, when the stockholder, either directly or through his broker, has tendered his stock after the offer has commenced, he has no way of knowing at the end of the offer period whether in fact he will get all of his shares accepted or whether there may be such a demand for shares that it will be as we call it prorated, and in fact out of a hundred shares he may only get eighty shares accepted and he'll have twenty returned to him. Therefore, a stockholder has a second option. He can sell on a National Securities Exchange. [128] By doing so a stockholder immunizes himself from the risk that he won't get all these shares accepted. Now, how does he sell? He sells through his broker to a dealer on the other side in the New York Stock Exchange who is operating as a principal not as an agent like the broker was I mentioned earlier, and this principal will buy over the Stock Exchange in a price such as such quoted in the Wall Street Journal at the regular printed price. He may pay a price which in fact is higher than the tender offer price, and he can afford to do that because as long as the difference between the price he pays and the tender price is less than the amount of his fee I mentioned, which is payable when he turns the stock in, he'll make a profit. Now, what he does to earn that profit is taking great risks because he's first taking the risk that he's bought all the shares and when he tenders them to the company, the company may say we're only

accepting seventy five percent, and it has to be prorated among everybody, so that he'll be cut back and given back a quarter of his shares, so he's taking the chance that he may be stuck with some shares the company doesn't accept. He's also taking the risk—

THE COURT: He'll make a profit on the ones he does tender and that are accepted?

[129] THE WITNESS: He'll make a profit if the offer is concluded. But I was going to say, Your Honor, he also takes the risk that after he's bought the shares the offer may be torpedoed, enjoined by some legal court, and in fact the company will not be able to accept the shares. Now, the arbitrager will not be able to go back to the person he bought them from and say, well, the deal is off. Here's your stock back. He has bought the shares firm and this is the function of the arbitrager. It is an element of risk taking and this is one of the things particularly in cash tenders which is an opportunity that shareholders of the target company have to accept a price which will be, reflects a good part of the premium which the tender offor is making or offering and taking no risk that the deal may be called off. This is what the effect of the arbitrage function is.

Q (By Mr. Conant) So if that tender offer is delayed the arbitragers risk money, he has the same cost of capital loss that you were talking about earlier with regard to the offor, is that correct?

A Yes, indeed, and most of the firms in the street do not have as much money as offor companies. [130] Their cost of capital is much more significant. They have to turn over their capital more rapidly and any delay will make

them much less willing to buy stock on the market, and in fact they would then lower their bid. If somebody offered them some shares they'd say, well, I can't pay what you're offering, I'll bid you less, and therefore the price on the market would be—would decline because of the effect of less demand for the supply of stock available.

Q All right. And so then I probably understand that the longer the matter is delayed the less the arbitragers are willing to pay for the stock or they're getting out altogether?

A The less they will pay, and also a number of arbitragers may try and unload before the thing is finally called off, if that's what they think is the outcome.

Q Okay. Is a result of that unloading generally expected to be a reduction, a further reduction in stock price?

A Yes.

Q Mr. Guest, does delay at, sometimes affect, otherwise affect a title offer, I mean a tender offer? Can it in fact lead to an ultimate frustration of the entire offer?

[131] MR. HEISER: Object to the question, Your Honor.

THE COURT: Let him finish the question first. Go ahead.

Q (By Mr. Conant) Can delay play any part in the complete frustration of a tender offer?

A In my experience the longer one of these things is delayed the more expensive it becomes for the offor or company to pursue the effort and—because I mentioned that it means during this whole period he has to perhaps forego other investment opportunities. He may finally come to the conclusion I'd rather drop all of this and go after

something else. That, of course, has a deleterious effect on the stock of the target company.

[132] Q. (By Mr. Conant) If a tender offer is entirely frustrated does the offeror nevertheless have certain additional expenses to pay, that is over and above what he has paid up until the time it's finally abandoned?

A. Yes. There are expenses which have been incurred by the dealer manager which normally are reimbursed.

MR. HEISER: Your Honor, it's beyond the scope of the question. The question asked for a yes or no answer.

THE COURT: I think it does. Your answer is yes or no?

A. Yes.

Q. (By Mr. Conant) What is the nature of those additional expenses that must be paid even in the event of frustration?

A. Those are expenses which are payable to the dealer manager and the dealer manager's counsel, and reimbursement of out of pocket expenses of dealers and others for postage and other solicitation expense. Those are typically paid even if a deal is called off, because they should not come out of the broker's or the dealer's hides.

Q. Is it fair to say then, Mr. Guest, that in the event of a cash tender offer, delaying the course [133] of that tender offer inures only to the advantage of incumbent management?

THE COURT: Well, he has indicated that the stockholders may sustain some advantage by someone else coming in and making a higher offer.

MR. CONANT: Yes, Your Honor.

THE WITNESS: I believe I did answer that one.

THE COURT: So the shareholders would probably have some advantage to a delay. All right. Now, is there any other advantage that would be shared by anybody else?

THE WITNESS: The only other advantage I can see is if some piece of corporate good news, like striking oil, occurred during the delay period, which would mean that the normal price of the stock, the pre tender price was in effect unrealistic, and if they had accepted the pre tender price they would have missed out on this bonanza that occurred in the interim. That could be a conceivable benefit.

Q. (By Mr. Conant) Assuming there is no corporate good news, the longer the tender offer goes on generally the lower the prices are going to go of the stock?

A. Yes, and I would also add that the stockholder [134] is bearing the risk of bad news, too. He might end up worse than he was quite apart from the impact of the arbitragers selling their stock, the market for the stock, anyway, might be lower.

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Transcript of April 8, 1977, jurisdiction and venue hearing:

Testimony of Leon Lebowitz, witness on behalf of Plaintiff—Direct examination

[139] • • •

LEON LEBOWITZ,

called as a witness by the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CONANT:

Q. Would you state your name, please, sir?

A. Leon Lebowitz.

[140] Q. And what do you do for a living, Mr. Leboitz?

A. I am a Professor of Law at the University of Texas at Austin.

Q. What do you teach at the University of Texas?

A. I teach a course in business associations which is essentially partnership and corporation law. I also teach a course in securities regulation. I also teach a course in introductory procedure.

Q. How long have you been at the University of Texas?

A. Twenty-one years.

Q. And where were you before that?

A. I was on the faculty at Baylor University.

Q. What courses did you teach at Baylor?

A. Essentially the same courses.

Q. Mr. Lebowitz, are you in any organizations or connected with any committees which study legislation and make recommendations concerning whether such legislation should be adopted in the State of Texas or anything of that sort?

A. I am. I am a member of the State Bar of Texas. I am also a member of the Section of Corporation and Banking and Business Law. In fact, I am the immediate past chairman of that section.

I am also a member of the Committee on Corporate [141] Revision Laws, and a member of the Committee on Securities and Investment Banking. Both of those two

committees make recommendations for legislation to the Texas Legislature with respect to corporate law and securities law, and as a matter of fact, virtually all of the corporate and securities regulation and legislation that has been passed in the last twenty years or twenty-five years has emanated from these committees.

In addition, these committees prepare comments which appear in the Annotated Statutes of the state.

Q. Has the committee had occasion to study the advisability of a State Takeover Act for the State of Texas?

• • •

[142] A. The committee has had at two—the Committee on Securities and Investment Banking on two separate occasions has considered the advisability of what you term takeover legislation or tender offer legislation.

The first time the matter was considered was at the fall meeting in September 18th, 1976.

By the way, I have the minutes of these two meetings.

At which time the agenda for the year in effect, the work of the committee was to be considered as to what projects we wanted to pursue in light of the fact that the legislative session would take place in January.

And at that time someone raised the issue should we consider tender offer legislation, and the matter was rather summarily dismissed on the ground that tender offer legislation was not needed in Texas, and there was not much discussion of the point.

At a second meeting which was held on January the 29th of this year, at a meeting held in Dallas, it was brought to the attention of the committee that there was going to be

introduced, or had been introduced in the legislature a tender offer statute, and we traditionally will take a position with respect to legislation that does not originate with our committee to decide if our committee wants to take a stand pro or against, [143] pro or con with regard to the legislation and make our views then known to the appropriate legislative committees.

At that time we had, according to the minutes, a very protracted discussion of the matter, and it was the unanimous opinion of the committee that Texas did not need a takeover legislation. But that if takeover legislation had to be adopted because of political realities dictated such, that we preferred a statute not along the lines of the model takeover statute which I think had been proposed by the Council of State Governments which was along the lines of, as I have since discovered, the legislation which is involved in the three states here, but rather in terms of the Delaware Statute, because we thought that it tended to be more neutral than the other types of state statutes.

Q. By neutral, what do you mean?

A. Well, in the sense that it was not weighed too greatly in favor of either the tender offeror or the target company. I think, as I recollect the discussion when we had our meeting, and I can't recall precisely who said what and perhaps had I know that I might be called upon to testify later as to what was being said, that I might have paid attention to who said what. But my recollection of the deliberations of the meeting was [144] that there were a variety of reasons expressed why tender offer legislation was not desirable in the first place.

There were some who felt that, perhaps free market economists, that any tender offer legislation inhibited the right of a shareholder to sell his stock at a premium whenever a tender offer was made.

There are others who felt that, well, Texas companies were not particularly targets of tender offers, and perhaps in some instances they might like to make some tender offers, therefore we don't need inhibiting legislation.

And I think also a feeling, particularly by the securities lawyers who had had considerable practice in the field, that they felt that the Williams Act was probably sufficient in informing the investors of the amount—to provide the investor with the kind of information he needed with respect to the tender offer, and that it appeared to be a fair statute in the sense of not taking sides one way or the other.

Assuming that—well, again considering the state statutes that were then available, and, of course, by this time I guess in '77 we were all aware of the fact that there were now over twenty states that had tender offer legislation, and again some folks on the [145] committee had experience with them and felt that the pattern of state legislation had become so chaotic because of the differences between one state's statutes and another, that it was virtually impossible for a tender offeror to be able to comply with all of them, and because this legislation had become so complicated we did not want Texas, in effect, adding to the system of chaos. We preferred to stay with the state system.

Plus the reaction, as I have indicated before that the state statutes that had been passed were by and large

weighted on the side of management in the sense that you had delays that it could entail. You had prefilings that had to occur. You had administrative hearings that might have to take place and that could further delay the proceeding, and that's why we felt that if we had to have a tender offer statute we preferred the Delaware approach, which does call for a twenty day prefiling period, then I think a twenty day period of time for the offer to stay open, but does not provide for any administrative hearings that might further delay the offer.

[146] • • •

Q (By Mr. Conant) You say that's the consensus in the vast majority of use of your Committee and it will so express itself to the Texas Legislature should it be called upon to do so in connection with pending legislation?

A That's correct.

Q You mention the chaotic administrative problems of the State, various state take-over acts. Let me show you what I've marked as Plaintiff's Exhibit 12 and ask whether you can identify that for me, please, sir?

A Yes. This was a table that was prepared by a student in a seminar that I had this past fall who wrote a paper on state tender offer legislation, and [147] as part of her study she prepared this chart which took the features of all of the current state tender offer statutes and compared them in terms of what target companies were covered; for example, whether there were any exemptions for the statutes, in terms of whether there was a waiting period, in terms of whether an administrative hearing was required, in terms of what kind of information was to be furnished and so forth.

Q Was this document then prepared under your direction and control?

A Yes. As a seminar student she worked directly under me and I supervised her work.

MR. CONANT: Your Honor, we will offer Plaintiff's Exhibit 12.

MR. HEISER: Your Honor, we will object to the admission of Plaintiff's Exhibit 12 on the grounds that it relates to laws which speak for themselves of which this Court may take judicial notice on the grounds that the document itself in the way it's prepared is hearsay and on the grounds that the document purports to reach a legal conclusion which is impermissible under the Federal Rules of Evidence and I cite to the Court the case of *Marks & Company, Incorporated, Plaintiffs* versus the *Diners Club, Incorporated and Others,* [148] *Defendants.* It's a Second Circuit United States Court of Appeals case cited September—pardon me, February 25, 1977. It's reported in CCH Federal Securities Law Reporter, paragraph 95,892.

THE COURT: What does that case hold?

MR. HEISER: That case holds that it is not proper to allow expert testimony to a legal conclusion. We submit that this document speaks to a legal conclusion.

THE COURT: Well, I agree with you. I think all the statutes will speak for themselves and it will be ultimately up to the Court if the Court is required to do so to interpret each statute. As I understand it, this is just an examination.

MR. CONANT: I think really, Your Honor, the document doesn't purport to take away from the fact that the statutes speak for themselves but merely to compare the different terms in those statutes in chart form.

THE COURT: I'm going to admit it for that limited purpose only and--so far as the statutes are concerned—I'm not going to be bound by what the chart itself indicates. If there's any question about it I'll look directly at the law itself and make my own determination of that.

Transcript of April 8, 1977, jurisdiction and venue hearing:

Testimony of William S. Dugan, witness on behalf of Defendant Lefkowitz, Attorney General of New York—

Direct examination

Cross examination at p. 176

Redirect examination at p. 186

[153] DIRECT EXAMINATION

BY MS. JUVILER:

Q Will you please state your name?

A William S. Dugan.

Q What is your present position, Mr. Dugan?

A I'm a Deputy Assistant Attorney General in the Department of Law in the State of New York.

Q Do you have a specialty in that department?

A I was hired under a grant, under a program set up to administer the New York State Tender Security Take-Over Disclosure Act.

Q When were you first employed?

A That was in approximately October of last year.

Q October, 1976?

A Yes.

Q Are you familiar with the Great Western United Proposed Tender Offer?

A Yes, I am.

Q How are you familiar with that?

A I was assigned that Tender Offer to review by Mr. Martin Weber.

Q And who is Martin Weber?

A He is also an Assistant Attorney General in—in the New York State Attorney General's office.

[154] Q Can you state very shortly what the relationship of the New York State Attorney General to the New York—New York Take-over Statute is?

A Of the Attorney General? The Attorney General is empowered under the New York State Security Take-over Disclosure Act to investigate any take-over bids involving corporations which are incorporated under the laws of New York or having their principal place of business and substantial assets within that state.

Q And in this regard is he the lawyer for a state agency? Is the Attorney General the lawyer for the state agency which administers this Act?

A Yes, he is.

Q Is he the administrator of the Act as well?

A Yes, he is.

Q For clarification, am I a member of the Securities Bureau of which you are a member?

A No, you are not a member of the Securities Bureau.

Q To your knowledge do I as the counsel here have anything to do with the administration of securities in the Attorney General's office?

A No.

Q Can you tell me when you first became acquainted with the Great Western United Corporation?

[155] A On Tuesday, March 22 I was assigned the review of the take-over bid by Martin Weber and I was handed a memorandum prepared by the law firm of Skadden, Arps to read and review.

THE COURT: Would you give us those names slowly?

THE WITNESS: Skadden, Arps.

Q (By Ms. Juviler) Is that Skadden, Arps, Meagher, I'm—I've forgotten one in between; of which Mr. Strom is a member or associate?

A Yes, he is.

Q Did you—you were required to review the memorandum that was referred to by Mr. Strom, is that correct?

A Yes, I was.

Q And that was on March 22?

A Yes.

Q Did you have any contact with any representative from Great Western thereafter?

A Yes, I did.

Q Can you tell us in outline form what those contacts were?

THE COURT: Who was it first, if you know?

MS. JUVILER: Yes.

Q (By Ms. Juviler) Who they were, when they [156] occurred and what was said?

MS. JUVILER: And they're not being introduced for the truth of what was said.

THE COURT: They're not?

MS. JUVILER: They're not being introduced for the truth of what was said but just that they were said, that these statements were made.

THE COURT: Okay.

MS. JUVILER: Not that—not that it is true that Great Western is offering, not that it is true that—okay.

THE COURT: All right.

A On, I believe March 22, in the afternoon I called Mr. Robert Pirie who I believe is a member of the firm

of Skadden, Arps. I inquired of him whether or not the proposed tender offer for shares of Sunshine Mining Company was to be effected within the next day or two. He informed me that it was not.

THE COURT: It was not?

THE WITNESS: It was not.

[157] Q. (By Ms. Juviler) Did he ask you anything, or was that the end of the conversation?

A. I believe that was the end of the conversation. No, excuse me. He made an inquiry as to whether or not a meeting could be held with representatives of our office to discuss the proposed takeover bid.

Q. What did you respond to him?

A. That I would see what I—what could—what could be arranged.

Q. Thereafter did you have any other contact with Great Western United?

A. Yes. The following day we had, March 23rd, I had another telephone conversation with the same Mr. Pirie, in which I—

Q. Excuse me, who called who in this one, if you remember?

A. The telephone conversation I am referring to right now, I believe I called Mr. Pirie.

THE COURT: Was this in regard to the meeting he had requested?

THE WITNESS: Yes.

THE COURT: Anything else?

THE WITNESS: I told him at that time that we were still looking into the jurisdictional question, and that—and that although we had not found on [158] the jurisdictional question we were leaning towards a finding of jurisdiction.

THE COURT: Okay. Go ahead.

Q. (By Ms. Juviler) Did Mr. Pirie ask you for any further information?

A. At that time I believe not.

Q. Did he make any further comments?

A. No. None that—

Q. When was your next contact with a representative for Great Western United, if any?

A. The following morning, this would be Thursday, March 24th. Mr. Pirie called me at around 9:15, I believe, in the morning.

THE COURT: March 24th?

THE WITNESS: Yes, that Thursday.

A. He stated that he could not, from the best of my recollection, he stated that he could not understand why New York was even thinking of asserting jurisdiction over the proposed tender offer for the shares of Sunshine Mining Company.

Q. (By Ms. Juviler) Did you respond to that statement?

A. I believe we had a discussion about—about certain—certain things that were incorporated in the memorandum of law which had been filed with the office [159] on that Monday.

THE COURT: By his law firm?

THE WITNESS: Yes, by his law firm.

THE COURT: All right.

Q. (By Ms. Juviler) Relating to jurisdiction or relating to some other matter, Mr. Dugan?

A. Relating to jurisdiction. I believe in that conversation I asked him what executive officers were there in

Kellog, Idaho. The memorandum of law had stated that there were several executive officers who were based in New York, and I inquired as to whether or not there were any based in Idaho.

Q. Did he respond to that?

A. I believe yes, he said—he said there were. I have forgotten the exact details.

Q. Did he say anything besides the comment that he didn't know why New York, whatever that comment was, I don't want to characterize your testimony?

A. He stated that I should—well, he suggested that I look into the bank accounts of the target company, Sunshine Mining, to see whether or not funds had been channeled in from other states into New York during the past week, the week preceding the time period we are talking about.

Q. Did he ask you anything else?

[160] A. Not that I—no, excuse me. He stated that Maryland, the Maryland Securities Commissioner had agreed to hold an evidentiary hearing bearing upon jurisdiction, whether or not jurisdiction over the tender offer lay in Maryland, and that if such a hearing were held that a decision on whether or not jurisdiction lay in Maryland would come down soon after that. And he inquired as to whether or not such a procedure could be set up in New York.

Q. And what did you respond, if anything?

A. Again, I told him that I would make inquiries as to whether or not it was feasible.

Q. Did he make any further comments or any further requests to your recollection?

A. Not to my knowledge.

Q. What did you do following that conversation relavant to your statement that you would make further inquiries?

A. I discussed it with various members of the Securities Bureau who were involved in the takeover, you know, the administration of the Takeover Statute.

Q. Then did you have any further contact with any representative from Great Western United, or did anyone else?

A. Yes. I believe I called—I attempted to get [161] in touch with Mr. Pirie at his New York offices in the afternoon of that same day, Thursday, March 24th. I was informed he was in Washington. Later that day Mr. Pirie called, I suppose, from Washington, and we had a conversation.

Q. And what was the subject matter of that conversation, what he said to you and what you said to him?

A. I believe I started off the conversation by stating that New York was not in a position to hold an evidentiary hearing similar to the one proposed in Maryland.

Mr. Pirie then asked me that should Great Western United file a statement under the Securities Takeover Disclosure Act with New York, could there be an expedited hearing under the provisions of the Securities Takeover Disclosure Act.

Q. What did you respond to that?

A. I responded that I had not, you know, I had not seen the filings to be made—possible filings to be made with our office, and I couldn't comment upon the gist of what was in those filings that may or may not have, you

know, brought about a necessity for having a hearing, and that I couldn't comment upon papers that had not been submitted to me. I believe at that time the conversation ended.

[162] Q. Was there any further contact between Great Western United, representatives for Great Western United and your office of which you are personally aware?

A. Yes, there were.

Q. When was that next contact?

A. That same afternoon, Thursday, March 24th.

Q. And what was the nature of that contact?

A. Mr. Martin Weber placed a call to—at first he was going to call Mr. Pirie until I informed him that his call had been made from Washington and was out of town. Mr. Weber thereupon called Mr. Strom in that firm from his office.

Q. How are you personally aware of that phone call?

A. I had discussed my—my conversation with Mr. Pirie among members of the office, including Mr. Weber and the chief of the Securities Bureau.

Q. What is his name?

A. His name is Orestes Mihaly. Mr.—at the conclusion of that meeting between members of the office Mr. Weber decided to call Mr. Strom, and he asked me to accompany him back to his office in order to listen in to the conversation he was to have.

Q. Did you listen on the phone?

A. No, I did not listen on the phone. I merely [163] was present in his office, and I only heard Mr. Weber's end of the conversation.

Q. But Mr. Weber affirmatively wanted you to hear what he, Mr. Weber, was going to say?

A. Yes, since I had been in fact with Mr. Pirie we wanted a—

Q. Is this the—do you believe this is the conversation referred to in general by Mr. Strom in his testimony this morning?

A. Yes.

Q. Did you head that testimony?

A. Yes, I did.

Q. Did you hear anything that Mr. Strom said to Mr. Weber on the afternoon of March 24th?

A. No, I did not.

Q. Did you hear what Mr. Weber said to Mr. Strom?

A. Yes, I did.

Q. Did you hear everything that Mr. Weber said to Mr. Strom?

A. Yes.

Q. Could you give us your version of that one side of the conversation?

A. Mr. Weber said that the position of our office had not changed, and that we were still leaning toward jurisdiction. I don't know if he understood those [164] exact words.

He thereupon said that for Great Western's own strategy concerning the takeover it might be better to file with New York in order to start the statutory twenty day waiting period running immediately.

Q. Did Mr. Weber—have you seen Plaintiff—I am sorry, Defendant New York City Exhibit 1 which is Mr. Weber's Affidavit which was filed this morning?

A. Yes, I have seen it.

MS. JUVILER: Can you give a copy of that Exhibit to the witness. That's New York No. 1. Thank you very much.

MR. CONANT: Excuse me, Your Honor. For the record we will again object to any references made to this Affidavit which we do not believe is properly in evidence and in order to prevent interrupting any more, may I have a running objection to that, continuing objection to that?

THE COURT: All right.

Q. (By Ms. Juviler) Do you have—is there any part of this Affidavit that does not accord with your memory of that conversation?

A. No, there is not.

Q. Did you hear Mr. Strom's testimony this morning and afternoon, I guess he testified both?

[165] A. Yes, I did.

Q. You did. Have you spoken to Mr. Strom about this Great Western United proposed filing previously?

A. No, I have not.

Q. From listening to Mr. Strom's testimony do you think that your understanding of the conversation and Mr. Strom's understanding of the conversation could have been different?

A. Yes.

MR. CONANT: I'll object to that, Your Honor. I think what the witness may believe is immaterial, irrelevant.

THE COURT: I'll sustain it.

[166] Q Did Mr. Weber to your memory refer to the prior conversations you had with Mr. Pirie?

A Yes.

Q As part of the conversation? What was the relevance of the reference to the prior conversations of Mr. Pirie as you heard the statements by Mr. Weber to Mr. Strom?

A Well, I had informed Mr. Weber of all my conversation with Mr. Pirie. I believe that he thought that I may have not left it properly with Mr. Pirie that we did not foresee the possible, you know, the necessity of a hearing to be held under this, under the statutes.

MR. CONANT: Your Honor, I object to that answer and this line where the witness is speculating on what it is that Mr. Weber may have thought about how it is that this witness left matters with Mr. Pirie. I think we're getting awfully far afield.

THE COURT: Sustained as to what his opinion is as to what are—what Mr. Weber thought on that particular occasion.

MS. JUVILER: I wasn't asking what Mr. Weber thought but what the relevance of—the reference to the prior conversations was to his understanding [167] of Mr. Weber's statement. It's really not—not terribly important.

Q (By Ms. Juviler) Mr. Dugan, do you know whether or not a determination was made by the Attorney General of the State of New York whether or not to assert jurisdiction over Great Western United Corporation?

A Yes, I do.

Q Was such a decision made?

A No, there was never such a decision.

Q Were you ever informed that the Attorney General had made such a decision?

A No, I was not.

Q Were you ever informed that the First Assistant Attorney General had made such?

A No.

Q Were you ever informed that Mr. Mihaly, the head of the Securities Bureau, had made such a decision?

A No.

Q Were you ever informed—

THE COURT: By anybody.

Q (By Ms. Juviler) That Mr.—well, let me—one crucial man, Mr. Weber had made such a decision?

A No, I was not.

Q Did you contact Great Western United thereafter [168] with regard to this tender offer?

A No. I had no conversation with representatives of Great Western.

Q Did they contact you thereafter?

A No.

Q To your knowledge did Great Western United contact any of your superior, or Mr. Weber's superiors with regard to that conversation?

A No.

Q Were any contacts—was any action taken after March 24 with regard to the Great Western United proposed tender offer?

A On March 25, that Friday, Mr. Mihaly told me in the afternoon to call the attorneys for the target company, Sunshine Mining, to arrange to have their financial, Chief Financial Officer, whose name is Mr. Lipka—

THE COURT: Lipka?

THE WITNESS: Lipka, (spelling) L-i-p-k-a, I believe is the spelling,—

A —to arrange with Mr. Lipka to come into our office and to give sworn testimony concerning juris—facts which would bear on the question of whether or not to assert the new—the New York State Attorney General should assert jurisdiction.

[173] the way?

A I was asleep.

Q Where?

A On—in Rockwell Center, Long Island.

Q Then what did you do?

THE COURT: You mean—you want to prove he got down here?

MS. JUVILER: But how he got down here and what it's like to come here and testify in these minor matters when we have to testify in the Northern District of Texas about a telephone conversation that occurred in New York when all the parties to it were in New York and available in New York.

THE COURT: If it was so minor he shouldn't have been here.

MS. JUVILER: It's minor but if you're properly defending your client and this one is relevant,—

THE COURT: If it's so minor I'll disregard his testimony, if you want me to.

MS. JUVILER: Your Honor, I make an offer of proof. If you're objecting to this testimony—

THE COURT: I'm not objecting to it. You implied this was a minor matter, and if you think [174] the man has been inconvenienced on a minor matter, you didn't have to bring him down here.

MS. JUVILER: It was a minor event in a case which might have many minor events, most of which will occur outside of this jurisdiction and involve many witnesses. We were told with some heat about Mr. Strom's inconvenience. We didn't inconvenience Mr. Strom. Mr. Strom came here from New York—

THE COURT: I'm not concerned if the witness was inconvenienced, really. I appreciate the fact he is here and I got his version of this conversation.

MS. JUVILER: And also I wanted to explain why there was no question that Mr. Dugan is quite tired today.

THE COURT: I'm tired, too, so I'm sure he's tireder than I am.

MS. JUVILER: We all are. He was compelled to appear here. He was compelled to appear here, and maybe some of us are here voluntarily. I'm not. But some of us are.

THE COURT: You what? You what?

MS. JUVILER: I'm not here voluntarily. I'm here pursuant to the command of the Southern [175] District of New York that I make a motion to dismiss on the basis of jurisdiction here and on the request of the Fifth Circuit that we—we come to argue jurisdiction and venue here, and only for that purpose, and that we make this witness available. Anyway, the fact is that after one o'clock yesterday morning Mr.—

THE COURT: He's—

MS. JUVILER: Mr. Dugan was enroute to this Courthouse.

THE COURT: Yes. All right. Thank you. Anybody else have any questions?

MR. HEISER: None, Your Honor.

THE COURT: Mr. Conant?

[176] CROSS EXAMINATION

BY MR. CONANT:

Q. Mr. Dugan, you said you first got involved in this on March the 22nd, is that right?

A. Yes.

Q. And you were assigned to review a memorandum that had been submitted by this guiding art?

A. Yes.

Q. Do you understand that that memorandum had come to the Attorney General's office and been delivered to the Attorney General's office the previous day on the 21st?

A. Yes.

Q. So there could conceivably have been a meeting of some sort on that date, which you may or may not have know about, is that correct?

A. I was—yes, there could have been.

Q. Tell me, did the Attorney General's office give notice to Great Western about the two scheduled appearances of Mr. Lipka for a sworn statement?

A. Excuse me?

Q. Did your office give notice to Great Western about the scheduled appearances of Mr. Lipka for a sworn statement?

A. No.

[177] Q. Neither when he was scheduled for the 25th nor when he was scheduled for the 31st?

A. No.

Q. Is that correct?

A. That's correct.

THE COURT: Are you required to, to your knowledge?

THE WITNESS: No, we are not.

Q. (By Mr. Conant) I assume that what, Mr. Lipka was going to come in and was going to give a sworn statement, and that was going to help the Attorney General try and determine his jurisdiction, is that correct?

A. Yes, sir. He was going to come in with corporate books and records or whatever was—whatever he deemed appropriate, and we were to ask him questions bearing on those issues.

Q. Well, I had understood that you had previously told Mr. Pirie, I think this was the first of the phone calls that you related took place on the 24th, that the Attorney General's office was not in a position to hold any sort of evidentiary hearing to determine its jurisdiction?

A. We are—this was not to be a hearing. This was to be an investigation which we are empowered to [178] conduct under the New York Act.

Q. Incidentally, you said that Mr. Pirie had asked you to check since substantial assets was in question as to whether or not Sunshine had channeled any funds into New York during the preceding week to bolster its bank account. Did you do that?

A. That was one of the things to be asked of Mr. Lipka.

Q. You were going to ask Mr. Lipka that?

A. Yes.

THE COURT: Is this an investigation, you say, preliminary to determining whether you are going to urge jurisdiction on the tender offer?

THE WITNESS: Yes. Yes.

Q. (By Mr. Conant) I believe that Ms. Juliver said earlier today perhaps in chambers that New York had handled four tender offer filings, is that correct?

A. Yes.

Q. Have you been involved in any of the rest of those?

A. No.

Q. Who principally has been in the Attorney General's office?

A. Mr. Eugene Berman and Mr. Martin Weber.

Q. When you joined that section were you given [179] any education or any counseling about the nature of tender offers, what they were, how they moved and the like?

A. Yes, we were.

Q. Were you made aware of the fact that tender offerors generally like to move those—their tender offers along as quickly as possible once they had announced proposing to make one?

MS. JUVILER: I object to the word "fact." He says it's a fact the tender offerors like to move them along.

THE COURT: Overruled.

A. Yes.

Q. (By Mr. Conant) Do I understand that the Attorney General's office is still now trying to decide whether it has jurisdiction under the New York Act or not?

A. Yes. Mr. Lipka is to give sworn testimony this—on Monday at 10:00 a.m., if he is not—

THE COURT: —engaged elsewhere.

A. —engaged elsewhere.

Q. (By Mr. Conant) So although the matter has been pending for review in your office since March the 21st, the

Attorney General's office has not as yet made any determination as to its jurisdiction?

A. True.

[180] Q. Notwithstanding its non-determination of jurisdiction, however, it has recommended to GWU that it file under the New York Act? I gather that to be the effect of some of the conversations which you have related to us?

A. If GWU wished to have the twenty days mandated by the statute start to run, then rather than wait for a determination on the jurisdictional issue an immediate filing would start those twenty days running, and if full and fair disclosure were made, then at the end of that twenty days that tender offer could be—could go effective in New York.

Q. So Great Western's choice was either to file with the State of New York and thereby trigger an automatic waiting period of twenty days, or to wait what has apparently already now been eighteen days for New York to determine whether or not it has jurisdiction to act?

THE COURT: Some of those days they could get back, he says. You should, too. Go ahead and answer the question. Are those the alternatives they had?

THE WITNESS: Excuse me.

THE COURT: You lost the train?

THE WITNESS: Yeah, I lost the train.

[181] THE COURT: All right. Restate the question.

Q. (By Mr. Conant) Is what you were telling me then is that GWU's alternatives on or about March the 22nd or within two or three days of that, March the 24th, GWU's alternatives were either to file with New York and thereby trigger an automatic twenty day waiting period, or to

simply wait what has now been at least a number of weeks until New York made up its mind on whether or not it had jurisdiction?

A. Those were two alternatives. They could have filed with New York and applied for an exemption from our statute. That's embodied in the statute, as—because the Temporary Restraining Order was issued by this Court, we were—we could not go forward with our investigation into the jurisdictional facts bearing upon the principal place of business and substantial assets. As soon as— as soon as that Temporary Restraining Order was stayed, we once again started to delve into those facts.

Q. So out of the past eighteen days that you have had this jurisdictional question before you there have been five days during which you were restrained from going forward, is that correct?

THE COURT: That's—

A. I believe so.

[182] THE COURT: That's correct, substantially correct.

MS. JUVILER: Well, Your Honor, Mr. Lipka couldn't come on the 29th, so that makes six days because of this action.

THE COURT: Well, that's true.

Go ahead, Mr. Conant.

MR. CONANT: Mr. Lipka couldn't come on the 29th?

THE COURT: Go ahead with your questions. And you can bring that out on your redirect.

Go ahead.

Q. (By Mr. Conant) Turning to the now famous phone call—

THE COURT: 24th?

Q. (By Mr. Conant) —on the 24th, do I properly understand that you were simply sitting in Mr. Weber's office when he called?

A. Yes.

Q. And that he called and asked for Mr. Strom?

A. Yes, I believe. I believe so.

Q. Who is Mr. Martin Strom?

A. Martin Strom?

Q. Yes.

A. I believe he is the member of the—of Skad- [183] den Arps, et al law firm in New York, and a representative of Great Western United at that time.

Q. Mr. Martin Strom is referred to in your Affidavit. Is he somebody different than Mr. Milton Strom who appeared here today?

THE COURT: Have you ever met—

A. No, I have not met Mr. Strom.

Q. (By Mr. Conant) So, then, where did you get the name Martin Strom that's in your Affidavit that you filed with this Court pursuant to your Motion?

A. I believed that his first name was Martin, unless—

Q. So then can you be absolutely sure that the telephone call you are relating which you believe occurred to a Martin Strom is the same telephone call that Mr. Milton Strom testified to here today?

A. Yes, I am sure it's the same phone call.

Q. Pardon?

A. I am sure it's the same phone call.

Q. Although you are not sure whether it's the same man. I take it, you said you didn't listen to the man on the other end.

THE COURT: Did not.

A. No, I did not.

Q. (By Mr. Conant) I assume that that phone [184] call, like most phone calls on either end, consists of a lot of yeses and nos, I don't knows, short form non-entire sentence responses, or do you recall?

A. No, there were some.

Q. Were there such responses that you could hear from Mr. Weber?

A. Yes.

MS. JUVILER: Could we clarify the question, what kind of responses, yeses or nos or long form responses?

Q. (By Mr. Conant) Anything that was not a complete sentence, did you hear any yeses from Mr. Weber?

A. I don't recall, you know, specific—

Q. Any nos from Mr. Weber?

A. I don't recall specifically.

Q. You don't know, in short, what the man on the other end of the line was asking Mr. Weber, or if he asked Mr. Weber anything to which Mr. Weber was responding?

A. No, I was not a party to the—

THE COURT: He didn't hear that end of the conversation, so obviously he doesn't know what was said.

[185] THE COURT: Anything else?

CROSS EXAMINATION

BY MR. CONANT:

Q Did I understand that on March 23 you, yourself, told Mr. Pirie that the Attorney General's office was, I think your words were, leaning toward finding jurisdiction?

A Yes, I informed Mr. Pirie, and I used those exact words, leaning towards finding jurisdiction.

Q All right. And that was a statement that you made to him, what, after consulting with other members of the office who had likewise reviewed the memorandum?

A Yes.

Q And that was a true statement at the time made to the best of your knowledge?

A Yes, it was.

Q And I believe that you testified, assuming your version of what Mr. Berman said to Mr. Strom is correct, he also stated to Mr. Strom the Attorney General's office was leaning toward taking jurisdiction?

A That was the gist of Mr. Weber's words. I don't know if he used that—

THE COURT: Words to that effect?

THE WITNESS: Words to that effect.

Q (By Mr. Conant) And that he suggested that [186] Great Western go ahead and file—

THE COURT: Yes. He's testified that's what he said.

MR. CONANT: Yes.

Q (By Mr. Conant) Are you still leaning toward taking jurisdiction?

A Yes, I would say so.

MR. CONANT: Pass the witness.

THE COURT: All right.

MS. JUVILER: I just have one question on redirect.

REDIRECT EXAMINATION

BY MS. JUVILER:

Q Did you notify Sunshine Mining Company or its representatives of your contact with Great Western United?

A Excuse me?

Q Did you notify Sunshine Mining Company or its representatives of your contact with Great Western United?

A No, I did not.

Q Okay.

MS. JUVILER: No further questions.

THE COURT: We're going to excuse him. Is that agreeable?

Transcript of trial proceedings:

In the United States District Court
for the Northern District of Texas
Dallas Division

Civil Action No. CA 3-77-0405

Title Omitted in Printing

BE IT REMEMBERED that commencing on May 23rd, 1977, the following proceedings were had in the above entitled and numbered cause, before Honorable ROBERT M. HILL, United States District Judge in and for the Northern District of Texas, at Dallas, Texas.

[2] APPEARANCES:

HON. A. B. CONANT, JR. and
HON. IVAN IRWIN, JR.
APPEARING FOR THE PLAINTIFF

HON. JAMES KAUFMAN and
HON. ELLIS McKAY and
HON. WILLIAM H. STEINBRINK
APPEARING FOR THE DEFENDANT,
STATE OF IDAHO

HON. AMY JUVILER and
HON. EUGENE D. BERMAN and
HON. WILLIAM S. DUGAN
APPEARING FOR THE DEFENDANT,
STATE OF NEW YORK

HON. MARK MARTIN and
HON. FRED FOWLER
APPEARING FOR THE DEFENDANT,
SUNSHINE MINING CORPORATION

[3] PROCEEDINGS

May 23, 1977
9:32 A.M.

• • •

[12] • • •

MR. CONANT: All right, Your Honor, let me first ask, do I understand that the Court is going to take notice of all prior hearings, testimony and exhibits in past hearings in connection with this cause?

THE COURT: Yes, we will take notice of those. Now, there were some reservations made at those earlier hearings by the Defendants relating to cross examination of those witnesses and those rights are still reserved at this time until they've had an opportunity to—I think there were one or two witnesses where there was no cross examination.

MR. CONANT: That's correct, Your Honor, but we—of course, the Plaintiff offered that testimony generally—

THE COURT: I take—

MR. CONANT: —at that time.

THE COURT: They have that right to develop the testimony that they want from that witness by cross examination. They still have that right reserved but you may go ahead.

We will take into consideration [13] at this time all that former testimony.

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Transcript of trial proceedings:

Testimony of David Wagnon, witness on behalf of Plaintiff—Direct examination

[14] • • •

DAVID WAGNON,

called as a witness in behalf of the Plaintiff, being duly sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. CONANT:

Q. Will you state your name, please, sir?

A. David Wagnon.

Q. Mr. Wagnon, how are you employed?

A. By Great Western United.

Q. In what capacity?

A. I'm Vice President of Great Western United.

Q. All right, sir. Mr. Wagnon, have you taken part in any of the activities surrounding Great Western's proposed tender offer for shares of the stock of Sunshine Mining Company?

A. I have participated in the various parts of that.

Q. Have you had anything at all to do with the compilation of the names, addresses of shareholders of the target company, Sunshine?

A. To a limited extent.

Q. Were you in attendance at a hearing in [15] Spokane?

A. I was.

Q. And what was the function of that Court hearing?

A. It was a suit on behalf of Great Western United requesting or requiring that Sunshine produce a stockholders record.

Q. Was Sunshine required to produce its stockholder list?

A. They were.

Q. Was that stockholder list delivered to you at Great Western by Sunshine?

A. It was not delivered to us by Sunshine. It was delivered, I believe, to their law firm of Freed, Frank. There was a copying attempt made at the offices of Freed, Frank, I believe that's correct. Their copying machine broke down—

THE COURT: Wait a minute. Were you just concerned about getting a copy of the list?

MR. CONANT: That's right.

THE COURT: Well, we wouldn't care about the copying machine.

In any event, did Great Western acquire from Sunshine a copy of the Sunshine shareholders list?

[16] A. Yes.

Q. Was that simply a list of paper or would you describe the form in which that came to you?

A. They were photostats of the stockholders of record as of December 20, 1976 and a photostat of the transactions that followed through March 28th. It was a photostatic copy I would say some twelve, fourteen inches thick.

Q. All right. Did you thereafter retain anyone to put that in—put that shareholders list in a form usable for Great Western's proposed tender offer?

A. We did.

Q. Who did you retain for that purpose?

A. Mr. Chris Murray.

Q. What was Mr. Murray to do for Great Western?

A. Mr. Murray was to take the material that we were provided by Sunshine and to put it into a workable order and to verify that the material that was given to us was in fact accurate at least as far as the materials themselves were accurate that were required by Sunshine and I believe Chase.

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Transcript of trial proceedings:

Testimony of Jeffrey B. Bartell, witness on behalf of Plaintiff—Direct examination; Cross examination at p. 72; Redirect examination at p. 105

[43] • • •

DIRECT EXAMINATION

BY MR. CONANT:

Q Would you give your name, please, sir?

A Jeffrey B. Bartell, (Spelling) B-a-r-t-e-l-l.

Q Mr. Bartell, how are you presently employed?

A I'm a Commissioner of Securities for the State of Wisconsin.

Q What is your educational background, Mr. Bartell?

A I have a degree in economics from the University of Wisconsin and a law degree from the University of Wisconsin Law School.

Q When did you graduate from law school?

A 1968.

Q Was that with honors?

A Yes, it was.

Q Following your graduation from law school how were you employed?

A I was employed for approximately three and a half years as an Assistant Attorney General for the State of Wisconsin.

Q And following that what did you do?

A I served for a little over a year as counsel [44] to a task force created by the Governor of Wisconsin to study the judicial of Wisconsin and make recommendations for restructuring of the courts.

Q All right, sir, and how long did you hold that position?

A About thirteen months.

Q And from that what did you do, following that?

A I was appointed Commissioner of Security in December of 1972.

Q Mr. Bartell, is it accurate to say that you are here by virtue of an agreement to come more or less under the threat by attorneys representing Great Western to otherwise take your deposition?

A That is correct.

Q And you were served with a subpoena when you got here; is that correct?

A That is correct.

Q Mr. Bartell, do you do any teaching or handle any seminars?

A I do some lectures at the University of Wisconsin Law School in Securities Law and Administrative Law.

I also have been appointed to the faculty of various American Bar Associations, American Law Institute [45] Seminars and institutes dealing with various securities

matters and in particular some matters involving corporate takeover.

Q Are you a member of any associations of administrators or persons connected with the securities business?

A Yes, I am. I am a member of the Central Securities Administrators Counsel which involves the nine states in the SEC Region IV.

I am a vice president of the Midwestern Securities Commission Association which is an association of twenty-eight states ranging from Ohio westward and I am also vice president of the North American Securities Administrators Association which is the organization comprised of the fifty states and the Canadian provinces, the securities administrators of all those states and provinces.

Q You said you were a vice president of both the Midwest and North American society?

A Yes, sir.

Q Do you act as an advisor to any groups interested in the securities regulation business?

A Any groups interested in—I'm sorry?

A Any groups, committees, associations interested in security regulation provisions and laws?

[46] A Yes. I am a member of the Advisor Committee on the proposed Federal Securities Code which is a new—it's a project commenced by the American Law Institute in 1968 for the purpose of codifying the Federal Security Laws into a single code.

Professor Loss of Harvard is the reporter for that project and I am one of twenty-two or so advisors to Professor Loss on that project.

Q Mr. Bartell, does Wisconsin have a State Takeover Act?

A Yes, it does, sir.

Q You are aware, are you not, that involved in the case at bar are the State Takeover Acts of Idaho and New York?

A Yes, I am.

Q Have you compared the Wisconsin act with either or both of those acts to determine their similarities or dissimilarities?

A I have compared Wisconsin law to both the laws of both those states.

Q Have you found that the Wisconsin act is similar to either?

A Yes. The Wisconsin act is almost identical to the Idaho law.

It bears some similarity to the New York law [47] but not near as much.

Q When did Wisconsin pass its Takeover Act?

A It became effective in July of 1972.

Q Do you know whether that was the first or the second or the third state to pass its takeover act, do you know whether chronology of Wisconsin is?

A Yes. Wisconsin was the fourth state in the nation to enact a corporate takeover law and the second state whose law involved a registration requirmement for corporate takeover.

Q It was passed in the same year that you became the Securities Commissioner of Wisconsin?

A That is correct.

Q Do you know how your tenure as the Securities Commissioner dealing with State Takeover Acts compares with those in similar positions in other states?

A I haven't made a person by person count, but I suspect that I have administered state takeover law longer than—longer than just about every other state securities administrator.

• • •

[49] • • •

Q (By Mr. Conant) Mr. Bartell, have you had [50] any filings under the Wisconsin Act?

A Yes, sir.

Q How many such filings?

A Under the Wisconsin Act we have—there are two parts to it.

There is a requirement that—for ownership information in the filing. We have had a great many of those. That filing is required when someone acquires in excess of five percent of the outstanding equity securities of the target company as that term is defined under the Wisconsin law.

The second part of the Act involves filings of the registration statements relating to corporate takeovers. We have, since the Act took effect in July of 1972, had, I believe, four filings under that section of our law.

Q Have all of those come under the category of being unfriendly tender offers?

A Talking about the latter category of filing?

Q Yes, those falling under your registration provision.

A No. I would say only one of the four could be fairly called an unfriendly corporate takeover.

Q Does the Wisconsin Act like that in Idaho [51] provide that the only tender offers that need be registered are those in which the management of the target company has not recommended the acceptance of the offer by the shareholders?

A That is correct. Under the Wisconsin law a proposed transaction in which the target company by its board of directors recommends acceptance to the shareholders is excluded from the definition of takeover.

Q Would you explain to me briefly why you say that three of the four registrations under the Wisconsin act were not considered unfriendly?

A Yes. Those three involved post transactions in which a segment of management or a segment of the persons who were affiliated, previously affiliated with the company, sought to by their publicly held shares to take the company private.

The only reason that the transaction was subject to the Wisconsin corporate takeover law was that the board of directors in exercise of its best judgment and fiduciary responsibility did not choose to recommend acceptance of the offer to the shareholders. So, the transaction was subject to the regulation provision of the takeover law.

Q So, three of the four registrations really was just between affiliates or closely related companies of [52] some sort?

A That is correct.

Q With regard to the fourth registration, the one in which you characterized as an unfriendly tender offer, would you give the Court briefly the history of the administrative procedure?

A Yes.

[53] A. Yes. This transaction involved a target company by the name of EZ, letters, EZ Painter, P-a-i-n-t-e-r (spelling), a Wisconsin corporation. It was a Delaware corporation with a principal office in Wisconsin and substantial assets in Wisconsin which was the target of a takeover attempt by a firm known as Nuon Companies, Inc., Freeport, Illinois.

The takeover registration statement was filed on December 5th, 1972. It was the week before I was appointed Securities Commissioner. And a request for hearing was filed with me on the morning that I walked into the office, December 11th, 1972.

Under the Wisconsin law and I believe under the Idaho law, a target company has a right to request a hearing before the Securities Commissioner, in which case under our statute and I think Idaho's, the Commissioner is obliged to hold a hearing.

I called a hearing in that case on the 15th of December and held several prehearing conferences within the next week. And a hearing then, five-day hearing transpired during the week of—I believe it was the week of December 20 or so, just before Christmas. The parties presented—both the target and the prospective offeror presented evidence. As I say, it lasted almost five days. Both sides [54] provided me with briefs and I issued an order and a decision on January 30th, 1973 registering the takeover. The takeover then proceeded and was successfully concluded in late March of 1973.

Q. Then I take it by virtue of the administrative proceedings, which sounds like you were doing everything you

could to expedite, the offer was held up for a period of about eight weeks or so?

A. That is correct.

Q. During this eight-week period were there any actions taken or threatened by the target company which might have had the effect of foreclosing the offer entirely?

A. Yes. There were a number of actions taken by the target company. There were several lawsuits brought in Federal Court challenging the legality of the proposed transaction under federal securities laws, the state securities laws and federal antitrust laws. There were—I believe that there was a state court action brought by the target as well on state grounds and the target company also proposed to arrange a merger during that period with a company that is headquartered in New York, pursuant to which the target, EZ Painter would have issued approximately 500,000 shares of previously authorized but unissued [55] securities, equity securities, to this prospective merger partner.

Q. Is that the sort of transaction that's known in securities parlance as a defensive merger?

A. I've heard it referred to in that manner.

Q. And did that defensive merger actually take place?

A. No, it did not.

Q. Why not?

A. Well, I can't say for sure why, all of the reasons that went into the target's decision not to proceed with the transaction. One factor, one thing that may have been a factor was that when the target informed me of these negotiations involving a prospective merger partner whose name had not been previously been involved in any of the

administrative proceedings or judicial proceedings had informed me of the nature of the merger that was contemplated which would not have required the vote of the target's shareholders in order to accomplish, I indicated to the target company through its lawyers that I considered that transaction as I understood it to be possibly a violation of the antifraud provisions of our corporate takeover law. And that I had an intent to review the transaction if it proceeded, with the [56] possibility of bringing an action in the circuit court for Damon County, Wisconsin to enjoin it as a violation of the Wisconsin corporate takeover law.

Q. That appeared to play a factor in their not going forward with a defensive merger, I take it?

A. I can't really say.

Q. Do you know incidentally whether the anti-fraud provision in the Williams Act likewise prevented a defensive merger of the sort that you've described?

A. Well, I don't think explicitly by the terms of Section 14(e), but I have read a recent case in which the Court—I think it was a Federal District Court held that a defensive merger of similar—in some respects to the one I've described, involved a transaction with no justifiable business purpose and without undertaking—without due diligence and in violation of the fiduciary responsibilities of it to the shareholders of the target constituted the violation.

MR. McKAY: If I may, I would like to ask that the last answer be stricken as I believe it deals precisely with the witness's interpretation of a reported case and nothing more, as I heard the answer.

THE COURT: I will sustain the [57] objection as far as it relates to his interpretation of the case.

Q. Mr. Bartell, have the State Takeover Acts in general become a subject for some scrutiny by the associations of which you are a member?

A. Yes, they have.

Q. Has the North American Securities Administrators Association undertaken any form of study of the State Takeover Acts?

A. Yes, they have. The North American Securities Administrators Association has created a committee consisting of all of the—when the committee was appointed it consisted of all of the states having a State Takeover Law and that number has increased since the time the committee was created, to review—review the various State Takeover Laws and to attempt to resolve some problems with those laws and to achieve, if possible, a degree of uniformity which is uniformity being the primary—uniform regulations being a primary objective of both of the Associations to which I'm referring.

Q. I take it then you are a member of that committee?

A. Yes, I am.

Q. And who, incidentally, is the chairman [58] of that committee?

A. Chairman of the North American Securities Administrators Association Committee on State Regulated Corporate Takeovers is Mr. Mihaly of New York.

Q. What, if anything, has that committee done to date? Is that—well, excuse me, let me withdraw that.

When was that committee appointed?

A. I believe the committee was formed, was appointed in September or October of 1976.

Q. And what activities has that committee taken since its formation?

A. The committee has—members of the committee have met with members of the staff of the Securities and Exchange Commission with respect to subject matter of the committee's inquiry, and have exchanged some correspondence on the subject and done a little research on the experience of the various states under their respective statutes.

Q. To the best of your knowledge, has there been any report rendered by that committee as yet?

A. No, there hasn't.

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[59] • • •

Q. (By Mr. Conant) Mr. Bartell, I think when we broke we had discussed a committee appointed by the North American Securities Administrators Association. Has there been similar work concerning the State Takeover Acts done by the Midwest Securities Administrators Association?

A. Yes, sir, there has.

Q. What has been the nature of the work done in that association?

A. Well, the Midwest Securities Association has likewise appointed a committee of the association to study the proliferation of State Takeover Laws and try to—try to develop some proposals for uniform regulations in that area. That committee is chaired by Commissioner Larson, State of Minnesota.

Q. Are you likewise of that committee?

[60] A. Yes, I am.

Q. I take it then from the intention, when these Acts are perceived in these associations there is considerable discussion among the administrators in the committee meetings and generally about the nature and effects of the State Takeover Acts?

A. Yes, I would say so.

Q. Also, you have characterized these—well, what you call a proliferation of the State Takeover Acts, would you expand on that for me? What you mean by the proliferation.

A. Well, it wasn't more than eighteen, twenty months ago that we only had about eight or ten of these laws in the country. Now we have, by my latest count, I think it's twenty-eight. That's what I mean by proliferation.

Q. In connection with your work in the association or on these committees do you make an attempt to review these laws as they come out and—

A. I try to.

Q. —compare them with your own and with others?

A. Yes, sir.

Q. In your study of this topic, both individually and in connection with other administrators, have [61] you reached any conclusions concerning the identity of the supporters of the State Takeover Acts in these various states?

MS. JUVILER: Your Honor, I object to this question as irrelevant. When the validity of a statute is at issue, the motivation of the legislature isn't the concern of the Court.

THE COURT: I think the motivation of the legislature would not be. Why don't you rephrase your—is that what you're inquiring into, who's lobbying for them?

MR. CONANT: Yes, Your Honor. As a group, what group generally lobbies for the State Takeover Acts.

THE COURT: I will let him testify if he knows who might be lobbying for—

MR. McKAY: Your Honor, now that the question has been clarified I would like to, if I may, also object and would like to suggest, if I may, that I believe there is substantial law to the effect that that kind of legislative history is not admissible as legislative history even if we were focusing on the meaning or intent of a specific [62] statute. But, as I heard this question it was a general question about state statutes generally which I think makes it therefore doubly objectionable. I don't see where it could lead us on the issues of this case.

THE COURT: I'm going to overrule the objection and limit his answer to the question that I've suggested.

What you're asking about, who sponsored or lobbies for the particular Takeover Statutes.

A. Well, the history of the Wisconsin law which is the one I'm most familiar with, indicates that the law did not, unlike most other security related legislation in Wisconsin, the Wisconsin Corporate Takeover Law did not originate in the office of the Commissioner of Securities for the State of Wisconsin. It was introduced at the request—the history indicates that it was introduced at the request of several Wisconsin firms by the legislators who represent the districts in which those firms were located.

MR. McKAY: Your Honor, if I may, I would move to strike that. I can't conceive that who pushed a Wisconsin statute has anything to do with the constitutionality of an [63] Idaho statute or New York statute.

THE COURT: I'll overrule the objection.

Q. In connection with your work and study of the State Takeover Acts in connection with your association otherwise, have you reached any conclusions about whether it is generally true of the State Takeover Acts that they have been enacted at the instance and with the active support of local industry?

MR. McKAY: Objection.

THE COURT: Overruled.

MS. JUVILER: Your Honor, I have a further objection in that I would like to base it for this witness's knowledge, if any, of who was—the background of other state statutes since he indicated that he was most familiar with Wisconsin.

THE COURT: I will let you develop that on cross. Overruled.

A. It is my impression from my discussions with other state securities administrators and my review of legal periodicals dealing with the subject that in many instances this legislation, legislation of this type does not initiate with the state securities legislature but initiates with firms that believe the legislation will be advantageous to them within that [64] state.

I think that as an example, the State of Ohio in which it is reported by ex-Securities and Exchange Commissioner Al Summers, that that is the manner in which one of the first of the state laws was enacted in that state.

THE COURT: Some of the Acts are initiated by the security administrators or commissioners?

THE WITNESS: Some of them are. I can't think of any right offhand but I believe that to be a fact.

THE COURT: Thank you.

[65] Q. (By Mr. Conant) Again, Mr. Bartell, from your work as securities administrator in the State of Wisconsin and from your activities with your associations in studying Takeover Acts, have you reached any conclusions concerning the effect of such Acts on takeover offers? By that, let me elaborate, if I may, on the number of takeover offers or encouragement or discouragement of takeover offers?

A. Yes, the number of takeover offers throughout the country since the Wisconsin Corporate Takeover Law was enacted has increased in each year. As I mentioned previously, the only contested takeover in Wisconsin occurred in very late '72 and early '73. I think it would be reasonable to conclude that the Wisconsin law has an effect of or has perhaps until recently had an effect of deterring corporate takeover offers in our state. I think that the proliferation, as I called it, of State Takeover Laws in the last year or two has perhaps changed the equation with respect to the effect of the laws, and it is possible that with more than half of the states having Corporate Takeover Laws now, it would be reasonable to conclude that new rules are in effect and that respective offerors have learned to deal with State Takeover Laws Perhaps the deterrence is not so great in recent years.

[67] Q. In connection with your association work and study of the State Takeover work, have these committees

which you have described isolated any administrative problems that they see in the State Takeover Acts, both individually and taken as a group?

A. Yes, they have.

Q. What problems principally have been isolated?

A. Probably foremost is the problem of defining a subject of a takeover attempt, sometimes called a target company, sometimes called the subject company. In various states, this entity is defined in terms of its—the location of its incorporation, where it's organized, the location of its principal office or executive office or principal place of business, whether or not it has substantial assets in the state or a substantial portion of its assets in a state, whether or not it has securities which are registered under that state's security law or are registered under Section 12 of the Exchange Act, whether it does business in the state and a number of other criteria and depending on the use of the conjunctive or disjunctive, there is a variation of how these factors fit together in the respective state laws. That's one area in which some uniformity has been sought by these committees.

[67] Q. Do the Acts which use the term substantial assets generally have any definition of that term?

A. Wisconsin does not, and, to my knowledge, most states' laws do not have further elaboration of that term, and that's another second area in which the committees of these organizations are working. It is virtually impossible before the commencement of a takeover offer to determine—for an offeror to determine what states might have or might assert jurisdiction in the transaction, and this is by virtue of the fact that many of these terms are vague

in respect to the meaning of substantial assets or substantial portion of the assets or the meaning of executive offices, for example.

Q. Due to the absence of definition and the differences in definitions in the various statutes, is it entirely conceivable that more than one state may assert jurisdiction under its Takeover Act over any administrative tender offer?

A. Oh, yes.

Q. What other problem areas, if any, have your associations and committees isolated as administrative difficulties?

A. Well, among the topics under review by these committees are the procedures that are employed [68] by the state regulator in reviewing a registration of a corporate takeover, such things as the waiting periods, the preoffer filing requirements, the hearing requirements, time in which a hearing has to be held and the time after which a decision has to be rendered and the judicial review of the decision. That's one broad area.

Another related area is a provision that's found in at least ten or eleven, perhaps twelve state laws that requires—including Wisconsin's and Idaho's, that requires the administrator to hold a hearing at the request of the Board of Directors of the target company, provisions relating to proration rights, withdraw rights and various rights comparable in some respects to provisions of the Williams Act, Federal Williams Act, but—and I think comparable, exactly comparable in Wisconsin and Idaho, but in other states, there have been some deviations from those provisions and uniformity there is also an objective

of the study. There are various other provisions of the state laws that are under scrutiny by these committees with the objective of achieving uniformity.

Q. What is the administrator's concern with the mandatory hearing provisions to which you alluded?

[69] A. In that respect, I can only speak for myself, and that is that I see no reason why target companies' Board of Directors should have an absolute right to the state administrator to hold a hearing if the state administrator, in his discretion, feels that a hearing is not required.

Q. You mentioned that you were—the administrators were also concerned with their procedures, including the time periods involved.

A. That's correct.

Q. What is the administrator's concern with the time periods?

A. Again, I can't speak for the other administrators. There has been no formal report of either of these committees. My concern is that the time periods which vary between states are, in many instances, inconsistent so that if a number of states are asserting jurisdiction in respect to a particular transaction, the offeror would have a difficult time either knowing what to expect as far as a decision is concerned or arranging financing and other plans in connection with the offer. The inconsistencies of the procedure are the factors that concern me.

Q. Mr. Bartell, am I correct that in your state, there is a provision that the offer or that [70] there is to be publication at the time that the registration statement is filed with you?

A. That is correct.

Q. And there is, I believe, a similar provision in the Idaho Act. Is that correct?

A. That's correct. It's publication of what is essentially a tombstone or a brief description of the proposed transaction, and then a disclaimer saying that this transaction has not been registered in the State of Wisconsin, Idaho and is not effective until it is.

Q. Is that same provision in all of the State Takeover Statutes?

A. No.

Q. Is it then conceivable that such a publication under your Act or Idaho's Act could actually constitute an offer without registration in some other state?

A. It is conceivable that another state would so interpret that advertisement.

Q. You mentioned earlier that you were on the advisory committee to the American Law Institute Recodification of Securities Laws. Is that committee concerned principally with federal securities laws?

A. Yes, the project is designed to integrate [71] into one code the various federal securities laws as amended but as originally enacted between 1933 and 1940, and the primary emphasis is on federal law, federal securities laws.

Q. Has that committee turned its attention to the question of the State Takeover Acts?

A. Yes, the draft of the proposed federal securities code includes a section that deals with the relationship between federal and state regulators in the securities area. That section was drafted about three years ago, perhaps

four years ago now at a time when there were probably no more than six or eight, maybe not even that many, four to six State Takeover Laws.

In that draft of the federal securities code, proposed, in assigning the regulatory responsibility, either of—over securities to either the Federal Government or the State or to both, that code chose to assign that responsibility in the takeover area to the Federal Government and to exclude the States.

Q. Then the draft recodification would specifically preempt the State Takeover Acts?

A. As it was originally drafted. That is a tentative draft, that's correct.

[72] Q. Is that still in whatever tentative draft is currently before that committee?

A. It is still the proposal that's in the tentative draft.

Q. When is that draft expected to be found?

A. As I understand it, Professor Laws (sic) is anticipating a final draft of the entire Code within the next year unless there are unforeseen problems, in which case it will be in another year or after that. The Code has to be approved by the American Law Institute which meets once a year in May.

Q. Do I properly assume that that draft as prepared by that committee was based upon some business considerations or considerations from a business standpoint of the effect of the takeovers, State Takeover Acts on corporate tender offers?

A. The reporter's comments to that section of the Code would indicate the reasons why that section was included in the Code. I was not a member of the advisory

committee at the time that that provision was drafted. It was drafted, I believe, in 1973. I became a member of the advisory committee in 1974.

MR. CONANT: Pass the witness.

CROSS EXAMINATION

BY MR. McKAY:

[73] Q. Mr. Bartell, I was interested in what Mr. Conant said early on that you were here in order to avoid being deposed or something like that. Was that an accurate statement?

A. Not exactly. The choice that was put to me was to have a deposition taken yesterday afternoon in Madison, Wisconsin, or to appear here before the Court today, and I chose to come here.

Q. Okay. As I understand your testimony, sir, apart from your general experience as Securities Commissioner in Wisconsin on things other than tender offers, and we recognize your high standing in the fraternity, your experience with tender offers has been limited to one unfriendly or contested tender offer; is that right, sir, plus three which were not unfriendly or hostile. Is that correct?

A. That summarizes the filings that have been made in Wisconsin.

Q. The filings which have been made in Wisconsin

A. That's correct.

Q. During your administration?

A. At any time since—

Q. And have you had any experience with respect to tender offers other than those on which filings have been made in Wisconsin?

[74] A. Oh, yes, I have consulted with persons who have come into the office to discuss the applicability of the State Takeover Law and the procedures that would be followed if a filing were to be made and the nature of the administration of the law, although the four cases that I mentioned were the only ones that were actually filed.

• • •

[75] Q Do I correctly understand that these conversations you had were with persons who were contemplating making a tender offer and were discussing with you the practicalities, is that the gist of it

A They were both with people who were contemplating a tender offer and with companies that considered themselves target companies in Wisconsin and therefore were perhaps expecting or possibly expecting a takeover attempt.

Q As far as any actual contested or possible tender offer situation, I take it you had personal experience with one, the one which you described?

A That is correct.

Q How many tender offers, sir, have been made in total under the Wisconsin statute? Have you told us about all of them?

A Yes, four.

Q Do you know, sir, how many tender offers have been made with respect to target companies which are subject to other state statutes?

A Since the beginning of time?

Q Well, the time didn't begin all that far back, about 1968, as I understand it.

A No. I think tender offers as a means of acquiring corporate control started probably in the early [76] '60s with some vigor.

Q I had in mind those which had occurred with respect to target companies which were subject to state statutes.

A The first state statute was enacted in 1968.

Q That was in Virginia?

A Yes.

Q Do you have any impression as to how many tender offers, let's say, hostile or unfriendly tender offers have been made under all the state statutes; that is, with respect to target companies which are subject to those state satutes, roughly?

A I would say that it is probably—unfriendly takeover, I would say it's probably in the area of sixteen to twenty.

Q All right, sir. Do you have any impression how many tender offers have been made in Wisconsin prior to the adoption of the Wisconsin statute in '73?

A I'm not aware of any.

Q There may have been some, you don't know; is that right?

A That's correct.

Q I understood you to say, Mr. Bartell, that while the state statutes in your opinion had had a chilling [77] effect on tender offers in the past, that the situation now was improved, that he chill was off and I think you said that offerors had learned to deal with the tender offers, the state statutes. Is that, sir, what you said?

A No. I didn't say that but I would personally tend to agree with that statement.

I think that—I think that with the experience that has been gained in the last year or so under the state statutes that there is developing a stratagem for dealing with them in the legal community that involves itself in this activity and I think that there is probably not so much what you referred to as a chill as there perhaps used to be.

Q Would it be fair to say, Mr. Bartell, that under the state takeover statutes—I've been calling them tender offer statutes, takeover statutes, are they roughly interchangeable?

A Some statutes refer to it as tender offer statutes, some states refer to it as takeover act.

Q Let's call them for the moment takeover statutes. Would it be fair to say that whatever the situation may have been in the early '70s that as of the present time these state statutes collectively, in your opinion, are not a significant deterring effect as far as tender offers?

[78] A No. I would say that there is still a significant deterrent fact of the state takeover statutes I think that effect has been lessened by proliferation of those statutes because there are a great many more states now which allow comparable positions so that when an offeror is shopping around for a prospective target company it would be much harder to find a prospective target that is not covered by one of the state takeover laws. I think that the deterrent effect has lessened but it's still significant.

Q Are you saying that as more states come to have these statutes the would be offerors are resigning themselves to the existence of the statutes and deciding they have to live with them and proceeding to make their offers despite the statutes?

A Exactly.

Q On this question of multiplicity, I believe you told Mr. Conant that there was a problem, as you saw it, at least potentially, in the sense that the state statutes are drafted in such a way that quite possibly a particular tender offer could be subject to more than one, indeed in some cases, several state statutes; is that correct?

A Yes.

Q Do you know, Mr. Bartell, or are you aware [79] that in the present case New York has expressly stated that they could not assert jurisdiction over this proposed tender offer and that there is only one state, namely Idaho, that is asserting jurisdiction?

A I learned that during the recess.

Q The multiplicity situation which you have said is a problem or a potential problem, are you aware of any actual examples, sir, where more than one state has actually asserted jurisdiction over a proposed tender offer?

A Well, I think that depends on what we mean by asserting jurisdiction. I am not aware of any contested takeover in which more than one state has held a hearing. I am aware of a number of cases in which a state statute has been interpreted to apply to the transaction but the administrative proceedings of that state were deferred.

Q Interpreted by whom?

A By the state administrator.

Q Thus he asserted jurisdiction?

A He was able to find that the transaction could be covered by the state law but deferred proceedings in favor of another state that had perhaps a greater interest in the transaction.

Q Similar to what New York perhaps did in the present case or do you know the facts on that?

[80] A I just saw a letter during the recess that describes what New York did. That's all I know about it.

Q I take it then, sir, that you were not aware of any situation where in fact a tender offeror has had to comply with more than one state takeover statute; is that correct?

A To the extent that you mean had to participate in a hearing, I think that's right.

Q How frequent is this hearing process you described? You've had one, I believe you said one in Wisconsin?

What was the result of that one, was the takeover successful?

A Yes.

THE COURT: EZ Painter case?

THE WITNESS: EZ Painter case, yes.

Q (By Mr. McKay) In the EZ Painter case, the one hostile takeover situation in Wisconsin which actually went through your office, as I understand it, was there a problem there of multiplicity or state statutes being applicable?

A No one involved in the case nor any other state raised a question concerning jurisdiction in another state.

Q You mentioned that there were three other [81] tender offer situations which were not really hostile. Was there a multiplicity problem in those cases?

A No.

Q Do you know by name or otherwise any instances in any other state where, in fact, a tender offeror was faced with a problem of dealing with the statutes of more than one state?

A Again, I just know that my knowledge is that there —to my knowledge there has not been another case in which a hearing has been held in more than one state. It is my impression, however, that offerors do have to deal with the potential of a hearing in more than one state and the potential of varying degrees of jurisdiction in more than one state.

Q Do you know any case by name or otherwise where an offeror has had to do anything short of a hearing actually filed a registration or do anything on a proposed tender offer in more than one state?

A No.

Q As state statutes go, state takeover statutes, Mr. Bartell, based on your knowledge and experience as you have described, do you regard the Wisconsin statute as a relatively good statute?

Q Good in what respect?

Q Well, what your criteria ought to be as far [82] as operating a state takeover statute. You've told us, I believe, or told Mr. Conant that there was some problems with the state takeover statutes?

A Yes.

Q Could you recap very briefly for us what the problems are in the state statute that you see?

A Problems have to do with the definition of the target company, what you would refer to as the multiplicity of the jurisdictional nexis; the specificity of the terms that are used to define that target company; the mandatory hearing requirement; the proceedings including the time limitations that are used, provided in the statute; the substantive

rights that are provided to tendering shareholders, that is, for the proration, withdrawal rates, so forth.

Based on those problem areas I would say that the Wisconsin law is not at all free of those problems and is not the works of the state statutes, somewhere in the middle.

If I were to be in a position to amend that statute I would have certain things that I would like to do to it.

Q Have you made recommendations or made efforts toward amendment of the Wisconsin statute?

A I have not, I am awaiting the work of these [83] committees that I've already testified to.

Q As compared to the Wisconsin statute I take it you have some knowledge about the Idaho statute?

A Yes, I do.

Q Would you regard it as better or worse or about the same, as the eye doctor would say?

A It's almost exactly the same.

It—the major difference the statutes that I saw was that it does not require the administrator to make a fairness finding and I'm not sure whether that's good or bad.

In a cash tender offer situation where cash is a consideration, I have indicated in my EZ Painter decision that I'm going to let the marketplace determine the fairness of that kind of an offer. So, there is really very little difference.

Q You mentioned some problems, sir, about the state statutes. Would you agree that there are also some pluses that the state statutes, in fact, do do some good?

A Oh, yes.

Q What would you mention as the plus areas as far as what the state statutes contribute to the situation?

A Well, there's no question, that the applica- [84] tion of the states statutes has had the effect in the cases where they have come into play, have the effect of extending the term of the offer during which period the price that has been paid for the shares has almost always gone up so that the shareholders received a greater consideration for their shares in connection with takeovers that ultimately were consummated.

Q Is that desirable in your judgment?

A Yes. In general terms I think that shareholders should get a reasonable price for their shares and I think that there are limits to it. I don't think that shareholders are entitled to a fair price plus a premium of some kind because it is a voluntary transaction but I think in general terms I think shareholders should get a higher price.

THE COURT: How does this high price come about? Is there more than one way that it comes, either the offeror increases his offer or the target company manages to obtain another offer?

THE WITNESS: These are the two principal ways in which the shareholder—

Q (By Mr. McKay) I can't hear you.

A These are the two ways in which the shareholders normally have received a higher price.

Q Those ways again are what?

[85] A The first way is where the offeror in order to—for further inducement for tendering and perhaps to obtain the concurrence of the target board has raised the price during the proceedings.

Secondly, where a—what has been referred to as a "white knight", or another offeror comes along and chooses to make an auction out of it, to bid the price up during the term of the offer.

[86] Q. You mentioned incidentally that you felt it was desirable that the shareholders get what, the best possible price?

A. Best price that the market will provide.

Q. You said that they ought not, however, get a premium price or a price more than the stock is worth. Have you ever heard of a situation where under a tender offer, hostile situation, shareholders got more than they should have?

A. I'm not personally aware of it.

Q. Well, it's tough to conceive of one, isn't it?

THE COURT: Doesn't the tender offer procedure and the written notice and everything else, given enough time, result in ultimately the shareholders getting the maximum value, that somebody who knows the value is willing to pay for it?

THE WITNESS: I use that premium term in the context juxtaposed with an involuntary situation. A going private situation where the shareholders are required to give up their equity ownership in the company, and it's my view that they should get not only a fair market price for their shares but they [87] should get a premium on the basis that they are being required to relinquish their shares at a time they may not want to relinquish their shares.

THE COURT: An involuntary divestment would in your opinion call for a permium?

THE WITNESS: That is correct.

Q. Mr. Bartell, would you agree that the longer the shareholder and the target company can have to increase its kitty, as it were, in the respect you mentioned, the greater the likelihood that the shareholder will get the maximum value for his shares?

A. I think that's true to a point. I think there is probably a time after which diminished returns—

Q. That's after some time, you're talking about?

A. It would be after some period of time.

Q. Like some weeks at least?

A. Yes.

Q. Maybe months, perhaps?

A. Perhaps.

Q. All right. Incidentally, I gather that when you say this is an advantage of the state statutes, namely that the shareholders get these benefits as described, I take it that your feeling is [88] that under the Williams Act and in the absence of state statutes, they don't get that benefit, is that right?

A. That is correct.

Q. Would you agree, sir, that this benefit which the state statutes afford as you've described, reflects a shortcoming or an inadequacy in the Williams Act insofar as looking out for shareholders?

A. I agree with that statement. I think the Williams Act is inadequate in regard to a period of time that is given to—to the shareholders to determine whether or not they will tender.

Q. Mr. Bartell, I interrupted you after you had mentioned one of the advantages of state statutes. Are there additional advantages?

A. Yes. I guess I would cite the advantage of—that the state statute was intended to provide, and that is a review by the state administrator of the disclosures and in some states the fairness of the tender offer. In conection with that review I think that the state regulator provides a forum that cannot be—that is a very important forum to have these issues resolved. The Securities Exchange Commission in connection with its administration of the Williams Act does not provide a comparable forum [89] for those kinds of reviews.

And secondly, I think a—more of a practical and unintended benefit of the state law is that it—that they have the effect of, by virtue of their deterrent, a detterence effect, having the effect of preserving the character of local industry, local companies and maintaining the employment base of the state and economic and social benefits that are not written into the state takeover laws.

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Q (By Mr. McKay) Mr. Bartell, with respect to the problem we discussed a little bit this morning on the question of several states simultaneously, potentially asserting jurisdiction over a tender offer, is it true, sir, that the state securities commissioners get together from time to time and various organization which you participate in and talk about certain things?

A The subject in general?

Q Yes.

A Yes.

Q Is that activity of those state securities commissioners collectively a useful thing, do you think, in minimizing that problem that might otherwise exist in this multiplicity business?

A Yes, I think so.

Q Has it, in your experience, resulted perhaps in some situations where one state might be inclined [92] to sort of yield to another state which appears to have a greater basis for jurisdiction over a tender offer?

A Yes, I think that that could happen. In some instances I think that there is a question as to whether a state administrator under his or her statute actually can defer to another state.

I think under the Wisconsin statute I would have the authority to do that, to, in effect, exempt the transaction from the takeover law where the application of the Wisconsin law would not be necessary for the protection of the investors.

Q And in a situation where your decision on that is perhaps influenced a bit by your knowledge that some other state was going to take jurisdiction?

A Yes.

Q As I believe you've testified this morning on direct exam there are a number of states that have these state statutes that we're talking about here.

Are you aware that there are presently about twenty-eight states which have provisions with respect to regulation of takeovers?

A That is my count now.

Q Are you aware that Texas is now in that group?

A Yes.

[93] Q And that was as of when, sir?

A May 6, I believe, their emergency went into effect.

Q By what route did Texas get in that group? Is that a result of some big, bad vested interest types lobbying in the Legislature or is that by some other route?

A I don't know if ther are big, bad vested interests involved. All I know is that the provisions are in the form of emergency rules adopted, I think purportedly—at least partly under the anti fraud provisions of blue sky.

Q Am I correct, sir, that the rule which now exists in Texas was put in by a Securities Commission itself, not by the Legislature?

A That is correct.

Q Does that now have the force of law in Texas as far as what has to be done on a takeover there?

A As I understand—

MR. CONANT: Your Honor, I believe I would object to that. That clearly calls for a question of American-Texas law, this witness's opinion on whether that was now the law in Texas.

THE COURT: I'm going to overrule it, goes more to the weight than the admissibility.

A (By the Witness) It is my understanding that [94] administrative rules have the force and effect of law.

Q (By Mr. McKay) So, if a proposed offeror now wanted to make a tender offer with respect to a Texas company with substantial Texas interests, whatever the criteria happened to be, he would have to deal with the

Texas rule just the same as he would if it were a Wisconsin or Idaho situation; is that right?

A I believe that to be true.

Q Do you, Mr. Bartell, see any significance in the fact that not a handful but twenty-eight of the fifty states, most recently Texas, have now got to the point where they have these state stakeover statutes?

A Do I see significance in that?

Q Yes. If I may suggest, sir, do you think that maybe there's some relevance in appraising the desirability and appropriateness of these statutes? I'm not talking about the narrow question of constitutional law, but the desirability that twenty-seven state legislatures plus the Securities Commission of Texas acting on its own have seen fit to do something about the situation?

A I think that that's significant. I'm not sure exactly what response you're seeking, Mr. McKay.

Q Would you believe, sir, based on your own knowledge and experience which you described that it would appear from this activity that a number of states have seen [95] a need for improvement of the situation that existed under the Williams Act in the directions that you were talking about this morning such as need for greater protection of shareholders in the discovery area, more time to get a better price and that sort of thing, would you agree with that?

A Yes, indeed.

Q You mentioned, sir, the committee which I believe you called the Loss Committee which was working on the proposed Federal Security Code—are we on the same wave length on this Loss Committee thing?

A I think so.

Q Did you testify this morning, sir, that it was recommending pre-emption in a proposed new Federal Code provision for pre-emption?

A Yeah. The Code as presently drafted involves a section that invokes the supremacy clause to a limited extent to pre-empt in the states in certain areas. Among those area is the regulation of takeover offers.

Q This is a proposed Federal statute which would provide that the SEC has total jurisdiction?

A Jursdiction would exclusive in the area covered by the Code section dealing with corporate takeover.

Q Did you work with the other members of this [96] group in discussing that situation, sir?

A No. As I mentioned, that provision was drafted before I became a member.

Q There's been no discussion of it since?

A Not among the advisory committee. There have been discussions individually, me with Professor Loss, on the entire section 1603 of the proposed Federal Securities Code.

Q Are members of this advisory committee reasonably bright, intelligent, well informed people in the securities area, would you say?

A I would say they are the brighter and most informed of them, the people in the securities area.

Q Would it be your impression, sir, as one who has worked with these people and is aware of what they are doing or trying to accomplish in this proposed legislature or this proposed—before legislature, that when they recommend that there be a statutory, Federal statutory

change to provide for Federal pre-emption that in their view pre-emption does not presently exist and therefore that statute is needed?

MR. CONANT: We'll object to that, calls for this witness to speculate on what others to whom he has testified he has not talked or participated in their discussions might have [97] thought when they wrote a specific pre-emption statute.

THE COURT: I'll overrule. Go ahead.

THE WITNESS: Your Honor, I'm afraid I'm not going to be able to testify except to say that I'm not aware of what their state of mind or intentions or beliefs were with respect to the subject of pre-emption was or was not apart from this new section under the Federal Security Code.

Q (By Mr. McKay) Do you share the view which was formulated before you joined this group that there ought to be an amendment to the Federal law or a provision in this new proposed code which does provide for pre-emption is that true of you?

A My view would be based on—my position on that issue would be based upon what the Federal Securities Code would provide with respect to Federal regulations or tender offers.

At the present time my view would be that it—the state should not be pre-empted based upon the manner in which the Code is presently drafted with respect to takeover offers. However, that provision dealing with the Williams Act is to be reviewed by the advisors and by the reporter and depending on the results of that review I [98] might change my mind.

At the present time I do not agree with the position of the Federal Securities Code proposing that the state be totally pre-empted.

Q I take it, sir, that your feeling then is that if the Federal law were to say the right things then pre-emption would be desirable and short of that it's not desirable; is that right?

A As a broad statement I would agree with that.

Q Now, I want to find out what things you think are needed to be provided in the applicable law, whether it be state or Federal, before you would vote for Federal pre-emption. What's needed to cause you to become a believer in Federal pre-emption?

A Well, I don't think I'd characterize myself as a believer in Federal pre-emption.

Q I'm sorry, but you said, I believe, that you felt pre-emption might be a good thing with the right provisions.

A Might be appropriate if the Federal law were adequate.

Q Would the things which you would like to see in a Federal statute before you favor pre-emption, you told us, I think, there are some things in the state statute [99] which are needed at least until a Federal law covers those things, would those things include such things as greater protection than the Williams Act now affords in terms of more time to make a decision?

A Yes.

Q More time to get all the facts including giving management an opportunity to comment?

A To respond, yes, sir.

Q Anything else that you would like to see in a new Federal act which operates in a pre-emption situation?

A I would like to see the Federal law provide for, among other things, for the offeror to be able to obtain a list of the shareholders of the target company which is presently provided under state law but not under Federal law.

Q Anything else?

A I would like to see the proration—the period for proration extended somewhat and the period for withdrawal, shareholders tendered shares extended somewhat.

I would like to see a period of perhaps confidential review by the SEC prior to the tender offer being made.

Those are some factors that I'd like to see.

[100] Mr. Bartell, I take it that all of those factors you mentioned are things which don't presently exist under the Williams Act; is that correct?

A That's correct.

[101] Q. In your article which you discussed with Mr. Conant or which he identified this morning, I note that you state at the bottom of page one that the history of the Williams Act, and I'm quoting for a moment here, suggests that the primary focus of legislative interest was on the public shareholder. Congress wanted to insure that a shareholder had the benefit of the full statement from the offeror. That the chance for incumbent management to give its side of the story, if it was so disclosed.

That is your understanding of what the Williams Act was seeking to deal with, is that right?

A. That is my understanding, yes.

Q. And to the same effect on the third page you state, it is shareholders who are the proper beneficiaries of the law's protection.

Do I correctly understand then, sir, that the Williams Act as you understand it was aimed primarily at protecting shareholders?

A. That is correct.

Q. And what was it, as you understand it, sir, that had existed prior to mid-1968 which required shareholders to be protected from?

A. Well, as I understand the situation in the sixties, there was a climate involving acquisition of [102] of corporations that prevailed that during which the offerors would make what were referred to in the Williams Act hearings as raids on what was called proud old companies. And they would pirate away, again quoting, their best assets. This was all done in a big hurry without an opportunity for shareholders to consider the offer adequately and without an opportunity for the target's management to respond in any meaningful way.

There was also a problem to the effect that the traditional antifraud provisions of the federal securities law did not apply to these transactions in most respects because 10(b) 5 had to do only with purchases and sales and did not protect nontendering shareholders or tendering shareholders whose shares were not picked up. For all of these reasons, as I understand it, Senator Williams and the others who molded this legislation felt it was important to equalize the balance between offeror and target company by providing a regulatory scheme pursuant to which the shareholders would ultimately benefit. And providing some anti-

fraud provisions that would regulate the transaction and require disclosure of all material facts and prohibit omissions of material facts.

[103] And this is the, as I understand the history that led to the Williams Act and it is the same kind of—these are the same factors that led to the development of the state laws, also.

Q. Are you aware, sir,—you've told us about the rights which it was intended to give shareholders under the Williams Act. Are you aware of any rights which the Williams Act was intended to give to the offerors?

A. I don't know of any rights that were explicitly designed for offerors.

Q. Or even implicitly?

A. Well, implicitly, the offeror has a right to rely on the procedures that the Williams Act Provide and—

Q. Which procedures required offerors to go through some rigamarole they hadn't previously been required to do, is that not right?

A. Yes. They had to go through the procedures.

They also can rely on the fact that given that the Williams Act prohibits misstatements in their solicitation materials it also prohibits misstatements in the target's materials as well.

Q. So an offeror under the Williams Act might be said to have been given a right under the Williams [104] Act to be free from or to not be suffering from fraudulent misstatements by the target company, is that it?

A. Yes.

Q. Any other rights which either expressly or implicitly were given to offerors by the Williams Act?

A. I can't think of any offhand.

Q. All right, sir. Now you've already told us I believe, that the Williams Act in your judgment did not go far enough as far as protecting shareholders and that some additional protection is needed by further legislation, whether state or federal, is that right?

A. Yes.

MR. McKAY: Your Honor, we have no further questions and we also have no objection to the article which was identified assuming as we do, that it is being offered to state the witness's views on the subjects there discussed.

THE COURT: M-6? It's admitted.

MR. CONANT: M-6, Your Honor.

THE COURT: Anything else?

MS. JUVILER: I have no questions.

THE COURT: Thank you, ma'am.

[105] MS. JUVILER: And I do not object to M-6.

THE COURT: Anything else?

MR. CONANT: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. CONANT:

Q. Mr. Bartell, you remarked several times in cross examination that you were aware of instances in which two or more states had determined that they had jurisdiction over a tender offer but that one had deferred to another, do you recall that testimony?

A. Yes.

Q. And you also testified I believe that you—you believe that under your Act, the Wisconsin Takeover Act, you yourself would have the power that if that came up, to so defer to another state?

A. I believe that that's the fact.

Q. Am I correct in saying that there is nothing however in your Act, Wisconsin Act, that would require your deference to another state?

A. I believe that's correct.

Q. Are you aware of any state takeover act which contains any provisions that would require its commissioners to defer to another state which also had jurisdiction?

[106] A. No, I'm not.

Q. So under the best of circumstances this deference procedure becomes a matter of the administrator's discretion, is that correct?

A. Yes.

Q. And am I also correct that you expressed an opinion that under some Acts there might even be a question as to whether an administrator could defer in the event of jurisdictional conflict?

A. Well, I think that there would have to be explicit statutory authority for the commissioner to defer if the statute requires the commissioner to act in the case of an application or registration. And I believe that there are—I have not done exhaustive review of the state laws in this regard, but I believe there are some states where—where that explicit authority does not exist.

Q. You told Mr. McKay that you saw some pluses in the State Takeover Act and I think basically you listed three. That frequently as a result of the delay the offeror raised the price to the shareholders. That they provided a chance for the administrator to review the disclosures and fairness of the offer. And the third one was that they preserved the character of local companies and local em-

ployment and the like. [107] Is that a fair resume of the pluses as you saw them?

A. Yes.

Q. Let me talk to you a moment about the first of those, that the offers frequently go up or the amount of money acquired by the shareholders goes up as a result of the delay. Is there any—is there any necessary connection that you can point to between the delay created by the State Takeover Acts and the rise in the price to the shareholders?

MR. McKAY: Excuse me, Your Honor. I will object for the record because I don't think that relates to anything that I dealt with on cross examination and I suppose that Mr. Conant is limited to that area.

THE COURT: I'm going to overrule the objection, Mr. McKay. Do you remember the question as put?

THE WITNESS: Yes.

THE COURT: Go ahead and answer.

A. I don't think there is any necessary connection in delaying of the increase in price.

Q. Are you aware of instances in which there was a takeover to which no State Takeover Act applied but during the pendency of the offer, the offeror raised the price?

[108] A. Yes.

Q. Have there been any discussions in your associations or your committees of the fact or at least the possibility that the State Takeover Acts themselves because of a lower opening price to be made, lower opening offer to be made for the target company's share than would otherwise be the case?

A. Yes. We have—we have discussed that possibility. I don't know of any particular instances in which that has occurred but it is, I think, in line with what I said before about developing a strategent for dealing with state takeover laws. That one of those strategies could very well be that the opening bid in a takeover attempt would be lower than it would otherwise be in the anticipation that the ante will have to go up during the pendency of the state proceedings in order to—in order to achieve a successful result.

Q. So when you said in response to one of Mr. McKay's questions that the legal profession seemed to be working out ways of dealing with the State Takeover Acts, that was one of the ways of dealing with the State Takeover Act you had mentioned?

A. Yes, that would be part of the strategy.

Q. Well, if that were the situation then, if [109] that in fact were the stratagem and becoming a common stratagem, then to a larger extent, any increase in price insofar as it could be attributed to the State Takeover Act?

A. That would be true. Hypothetically, that would be true. As I said, I don't know of any particular instances in which that has occurred.

Q. In any of these instances which you are aware when the price went up, do you know whether outside or other compensations to incumbent management likewise went up?

A. I don't know of any particular cases in which that happened. As a securities regulator I would certainly be concerned if management were able to obtain, in connection with this transaction, special benefits that the shareholders were not able to obtain.

Q. You are aware, as an administrator, are you not, that that's not infrequently the case in negotiations between the target and the offeror, that the incumbent management wants job security or some other emoluments in order to buy their recommendation of the offer?

A. Yes, I'm aware of that. The state statute does prohibit the offer being made to management [110] shareholders on different terms from those that are offered to nonaffiiliated shareholders. But I'm aware that long-term employment contracts, various other special considerations are sometimes offered to management.

Q. Are there some State Takeover Statutes that do not require disclosure of these—any additional emoluments paid to the managers or the shareholders who are also management?

A. I don't think so. I think that that kind of information would be required under every state law that I'm aware of.

Q. It is a common characteristic of Takeover Acts, is it not, that if management recommends the exception by shareholders' tender offer that the state administrative agency never even takes jurisdiction or never even can take jurisdiction to look further into the offer, isn't that correct?

A. That is correct. It's common that such situations are excluded from the definition of takeover.

Q. That provision also gives rise to another question. These Acts are not infrequently justified on the basis of protection of local shareholders. In the case of your State Takeover Act in Wisconsin, is there any—any provision in determining whether [111] or not you have jurisdiction

over a particular tender offer which is tied to the question of whether there are any shareholders of the target company resident in Wisconsin?

A. There are none, that is true. As I understand it, of nearly every state takeover law, that there is no requirement for jurisdiction that any shareholders reside in the state asserting jurisdiction under the takeover law.

Q. So conceivably you as a state administrator could be put in the position of passing upon a tender offer when there would be no shareholders in the State of Wisconsin who would be affected by that?

A. That is conceivable.

Q. Do you understand that the Texas—these Texas rules, under whatever authority they were promulgated, do in fact contain a shareholder jurisdiction trigger?

A. As an alternative, as I've reviewed the rules, they provide a jurisdictional trigger if a majority of the shareholders or a majority of the shares are located in Texas. There are also some other jurisdictional triggers.

Q. Is that provision in your experience a unique one among state takeover regulations?

[112] A. Absolutely unique.

Q. The second plus that you saw was that the State Takeover Act provided for a preliminary review of the sufficiency of the offeror's disclosure and the basic fairness of the transaction. In your State Takeover Act in Wisconsin, are you given much in the way of guidance as to what are sufficient disclosures about each of the matters that are listed in your statute?

A. We have the statutory provisions which set forth the required disclosure. We have some administrative rules

that elaborate somewhat on those statutory provisions. Beyond that, we have to consider that each transaction, the facts and circumstances in order to determine what disclosures are appropriate in the entries for the protection of investors.

Q. So your view of what would be a sufficient disclosure in a particular tender offer might very well differ from say the view of an Idaho securities administrator operating under essentially the same Act?

A. Yes, that is true.

Q. Also did I understand you to say that at least in your view the question of fairness was one [113] that should be worked out in the market place?

A. I said that with respect to a cash tender offer. With respect to cash I think that the market place forces have a greater impact. If the offer involves an exchange of securities I think a fairness determination would be much more important.

Q. Likewise if it involved an exchange of securities we would be dealing with a different set of federal rules and federal statutes, would we not, federal laws?

A. That is correct.

Q. So for purposes of this hearing let's assume when we talk of tender offers, that both you and I are discussing cash tender offers.

A. That's fine with me.

Q. Would you explain to me a little bit, if you would; the fairness should be worked out in the market place. What do you mean by that?

A. What I mean is that where an offeror is—has indicated to shareholders that it's willing to pay such and

such a price for the shares, net, that— and the shareholders have complete information regarding the offer and know what the market price of the securities or recent trades have been, that it's perfectly within the investor's ability to be able to [114] judge the adequacy and fairness of that price and determine whether they want to tender at twenty-one or whether they think that price is too low and they should hold out and see if the offer should be made at twenty-three, or if the market price will go up to twenty-three during the pendency of it.

Q. In order for the market place to actually make that determination then, the offer must in fact be made and be outstanding so that the purchases and sales can take place and we can determine what the market place is doing, is that right?

A. Yes.

Q. You discussed with Mr. McKay, again in the idea of time, you said in your estimation at least some delay was a good thing but how much was an altogether different question. There was, I think you used the term diminishing return at some point in time. Is that a fair summary of your position?

A. Yes.

[115] Q. Are you aware, Mr. Bartell, that Congress did when it passed the Williams Act give some fairly extensive consideration to the time factors?

A. Yes.

Q. And are you aware from your review of the history of that Act, such other sources you deem necessary, that Congress—that it was proposed to Congress by various people that there be preclearance requirements of various lengths?

A. Yes.

Q. And each of those requirements were, at least insofar as they dealt with preclearance requirements were rejected by the Congress in passage of the Williams Act?

A. Yes.

Q. So then what you are telling us here, though, at least in your opinion, you disagree with the way in which Congress put together the regulatory scheme that came to be known as the Williams Act?

A. In some respects, right.

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Transcript of trial proceedings:

Testimony of G. Michael Boswell, adverse witness

on behalf of Defendant Idaho officials

Direct examination

Cross examination at 201

[151] • • •

Q. When you received Mr. Baptie's letter, did you regard that as a departure from what Mr. Metzger had told you Mr. Baptie was going to require?

A. Yes, sir.

Q. And why, what respect did you regard it as a departure?

A. Because the letter, as I recall, called for quite a bit of disclosure that in my opinion was irrelevant as it related to a cash tender offer and quite a bit of requests that were for subjective materials and for request of items that were more [152] properly in my mind includable in a registration statement that would be utilized for the sale of a security rather than what I had understood to be a filing predicated upon the disclosure requirement by a 13(d).

Q. And your complaint therefore was that he was asking for more than a 13(d) did and you had been led to believe that he would not ask more or at least not very much more, is that what you've told us?

A. I believe the complaint stated that the letter was unreasonable, unnecessary and other things and that was my opinion concerning the letter at the time we received it.

Q. But was it unreasonable in your mind and you have said this, essentially because he was asking something more than a 13(d) did?

A. No, sir. It was in fact more than a 13(d), but had I known in advance what he was going to ask for in his attempt to enforce his statute, I don't believe that we would have filed in the first place.

Q. I gather then what you're saying, Mr. Boswell is that if it hadn't been for what Mr. Metzger told you he had been told by Mr. Baptie, then you would have not filed in Idaho, is that the point?

A. No, I don't think that's a very good rendition [153] sir. Idaho had never had a filing under its statute.

Q. Yes, sir.

A. Idaho was frank, as I understand it, in expressing to us its concern over its lack of staff and its lack of guidance. If we had known in advance as to what Idaho was going to ask for with regard to complying to this statute, I don't believe that we would have filed. But I don't think that that decision hung on what Mr. Baptie told Mr. Metzger.

Q. All right. What would you have done if you had known in advance you were going to get a letter like Mr. Baptie's letter?

A. Probably filed this lawsuit sooner than we filed it.

Q. All right. In other words, at the time you filed in Idaho you had already considered the constitutionality of the statute and had already completed a possibility of filing a lawsuit charging it?

A. I don't think that I could say we contemplated it. We had discussed the difficulties involved in complying with Maryland, New York and Idaho and it was our belief at that time that we would have to file in all three places and we had lengthy discussions with counsel concerning the problems created by the Idaho disclosure and publication notice in light of the [154] fact that New York had a statute which prohibited publication. We had gone into it extensively whether or not the local papers in Boise had any residents of New York which received this paper and we found that it did. And we were very concerned as to whether or not compliance with one statute would lead to violation of another statute, what the time requirements would be and whether or not we had alternatives available to us other than compliance.

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[163] • • •

Q You state, sir, in paragraph 23 of the complaint that the Idaho order requires Great Western as a prerequisite to making a tender offer to alter the terms of that offer. I'll stop there.

In what respect, sir, did the Idaho order require Great Western to alter the terms of the offer?

A As I recall, sir, the $200,000 support for reimbursement of the shareholder committee efforts had been mentioned by Idaho and they had asked for—to be included in the solicited materials, materials of a highly subjective nature with regard to projections, almost, which we felt

that we could not properly comply without running afoul with the provisions of the Williams Act.

Q Anything else that you regarded as a change required in your offer?

A Not that I recall, sir.

[164] Q Can you elaborate for us, please, this problem about possible conflict with the Williams Act or running afoul with the Williams Act?

A I'll have to refer to the letter itself, sir.

Q Fine, sir.

A (Witness refers to document.) All right, sir. On page 3, the third paragraph from the bottom states as follows, the first sentence of the second paragraph on page 41 states:

"The purchaser has filed with the Commission preliminary proxy material relating to the proposed plan of recapitalization. We ask that a more definitive description of the proposed plan be disclosed indicating any possible effect such plan might have with regard to the Sunshine Company."

We were advised by counsel that inasmuch as we have filed this proposed plan of reorganization and recapitalization under the proxy rules and inasmuch as the proxy rules were treated as confidential and inasmuch as we were unwilling to disclose the items under that plan until such time as we had received comments back from the Commission that a further explanation of that plan in the tender offer could be considered to be gun jumping under the Securities Act and could in and of itself violate the [165] Williams Act.

Q All right, sir. Was that problem that you just described which the counsel and you concluded Great Western had ever discussed with Mr. Baptie or anyone in Idaho?

A I presume that Mr. Metzger discussed that problem and other problems raised by this letter with Mr. Baptie.

Q Why do you presume that, sir?

A Because that's his job.

Q Did you and he talk either before or after his contact with Mr. Baptie about whether he was going to discuss that or such things?

[166] A As I recall, sir, Mr. Metzger contacted Mr. Baptie at the receipt of this letter and had a conversation with him concerning the contents of the letter, and Mr. Metzger reported to me following that conversation that he felt that the atmosphere and the attitude of the Idaho Commissioner was entirely different than it had been in the preceding week, that it was a somewhat hostile atmosphere and that he was uncertain, he, Mr. Metzger, as to whether or not we would ever adequately ever be able to satisfy the requests or the demands of the Idaho Commissioner.

Q Yes, sir. You told us that and in almost precisely those words but my question was whether you know whether Mr. Metzger talked with Mr. Baptie about this precise problem which is, I can see, is a substantial problem for Great Western as you described it once the facts are all known. Do you know whether Mr. Metzger discussed that with Mr. Baptie?

A No, sir, I can only assume that he did. I do not know.

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[178] • • •

Q. (By Mr. McKay) Page nine of the complaint, Mr. Boswell, Paragraph 26, you state in the sixth line [179] that Great Western would be deprived of its rights under the Williams Act to make its tender offer at a premium

above the market. I realize that in a sense we're talking lawyer and one question which is probably a legal question in this case, although I'm not sure, it may be a factual question as to whether the Williams Act granted the offerors a right, but you're a lawyer, and, therefore, I will ask you, is it your position, sir, that Great Western as an offeror was given a right under the Williams Act to do what you say here?

A. I guess—

MR. IRWIN: Your Honor, I'm going to object to the question.

THE WITNESS: I'm not clear on the question.

MR. IRWIN: You asked him to respond as an attorney representing Great Western and interpreting the rights?

THE COURT: Let's do this. Give him a right or give Great Western a right to do what specifically, to do what, the Williams Act?

Q. (By Mr. McKay) I'm quoting now the complaint, sir, a right—Great Western will be deprived of its right under the Williams Act to make its proposed cash [180] tender offer at a premium above the market price to shareholders of Sunshine throughout the country. Now, my question is whether in this witness's view the Williams Act gave a right to a tender offeror to make a tender offer of any kind, the Williams Act gave a right; is that your position, sir, as the executive vice president, Plaintiff and a lawyer?

A. My position?

Q. And just answer yes or no or I don't know. I won't pursue it.

THE COURT: I will let you answer it.

THE WITNESS: Yes.

Q. (By Mr. McKay) All right.

A. Okay.

Q. Fine. Paragraph 27, you say that the existence, the very existence of the State Takeover Acts, and I am not clear whether you're talking about three of them or twenty-eight of them, but in any event, the existence of the State Takeover Acts and the Idaho order has had, and unless enjoined, will continue to have a chilling effect upon the exercise of rights of prospective tender offerors throughout the country. You allege that as a fact under oath?

A. Yes, sir.

Q. Are you an expert on this subject, sir?

[181] A. Yeah, I think I probably am.

Q. Good. Well, we got an expert here. Did you make a study of the chilling effect or any other effects which the State Takeover Acts have had on tender offers throughout the country?

A. As an investment banker, as a lawyer and as a businessman, I have been involved in several tender offers, and I know that since the passage of the Takeover Statutes, there has been an effect which is to discourage tender offers.

Q. You know that how, through the effect it's had on you as a potential offeror or the effects had on people who were potential offerors who said it had a chilling effect on me or from what?

A. From reading trade publications such as a periodical called *Merger and Tender Offers,* from attending various legal security law seminars, and from general discussion with investment bankers.

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In the United States District Court
for the Northern District of Texas

Dallas Division

Civil Action No. CA 3-77-0405

[Title Omitted in Printing]

BE IT REMEMBERED that commencing on May 24th, 1977, the following proceedings were had in the above entitled and numbered cause, before Honorable ROBERT M. HILL, United States District Judge in and for the Northern District of Texas, at Dallas, Texas.

[183] APPEARANCES:

HON. A. B. CONANT, JR. and
HON. IVAN IRWIN, JR.
APPEARING FOR THE PLAINTIFF

HON. JAMES KAUFMAN and
HON. ELLIS McKAY and
HON. WILLIAM H. STEINBRINK
APPEARING FOR THE DEFENDANT,
STATE OF IDAHO

HON. AMY JUVILER and
HON. EUGENE D. BERMAN and
HON. WILLIAM S. DUGAN
APPEARING FOR THE DEFENDANT,
STATE OF NEW YORK

HON. MARK MARTIN and
HON. FRED FOWLER
APPEARING FOR THE DEFENDANT,
SUNSHINE MINING CORPORATION

[184] PROCEEDINGS

MAY 24, 1977
9:39 A.M.

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[201] • • •

CROSS EXAMINATION

BY MR. IRWIN:

Q. I am going to move this as quickly as I can. In your testimony on cross yesterday, I think you identified Mr. Baptie as the Securities Commissioner. I think his actual title is Deputy Administrator, Securities, as shown on the letter attached to the Complaint. Is that correct?

THE COURT: It will speak for itself.

THE WITNESS: Yes, sir.

THE COURT: I think that's correct.

THE WITNESS: Yes, sir, that's correct.

Q. (By Mr. Irwin) Now, did Great Western's representatives receive along with that letter the order of the same date from Mr. McEldowney which reported summarily to restrain the proposed tender offer of Great Western?

A. Yes, sir.

Q. Have there been any hearing prior to the [202] issuance of that order from Mr. McEldowney?

A. No, sir.

Q. Have you any notice prior to the receipt of that order that the tender offer was going to be restrained by Idaho?

A. No, sir.

Q. Very quickly, going back to the problems that you have enumerated in some respects as contained in that letter, you testified yesterday that there were projections which you believed you could not properly make in Idaho without risking a violation of the Williams Act and one of the projections that you focused upon was the preliminary proxy material and your reference to the gun jumping rules under the '33 Act?

A. Yes, sir.

Q. Are there also provisions in that letter which created problems with respect to any proposed merger plans of Great Western?

A. Yes, sir.

Q. Now, why would the requirement of disclosure of proposed merger plans and the effect of those plans upon Sunshine Mining Company and its shareholders as requested by the Idaho Administrators create problems under the Williams Act?

[203] A. Because those plans were very preliminary, premature, and we had actually no firm intention one way or another as to what form an ultimate merger might take, as such, we could not put together projections or financial statements showing the combined companies, and if we had done so, we would be faced with the same sort of problem that we were with regard to the proposed recapitalization and reorganization plan.

Q. Were you with me in Boise, Idaho, on April 7 and 8 in connection with the Sunshine application for preliminary injunction against this tender offer.

A. Yes, sir.

Q. Do you recall that that very issues was one of the issues that was raised by Sunshine and was resolved in favor of Great Western by Judge Callister?

A. Yes, sir.

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Transcript of trial proceedings:

Testimony of Francis Wheat, witness on behalf of Defendant Idaho officials—Direct examination

Cross examination at 272

[221] * * *

FRANCIS WHEAT,

called as a witness on behalf of the defendant, the State of Idaho, having first been duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. McKAY:

Q Would you state your name, sir?

A Francis Wheat.

Q Your address, Mr. Wheat?

A 515 South Flower Street, Los Angeles.

Q That's your office address?

A That is correct.

Q Home address?

A 2130 Lombardi Road, San Marino, California.

Q What is your occupation?

A Lawyer.

Q With which firm are you affiliated?

A Gibson, Dunne & Crutcher.

Q You're a partner there?

A Yes, sir.

[222] Q How long have you been with them, sir?

A Since 1958 with one period of five years during which I was in Washington.

Q You're a partner since when, sir?

A Since 1955.

Q The period of time which you were in Washington, you did what?

A I was a Commissioner of the Securities and Exchange Commission.

Q In your practice, what is your area of specialty, if you have one?

A Well, my broad area of specialty is corporation law, corporation and financial law.

Q Has that been true since the time you joined Gibson, Dunne & Crutcher?

A No.

Q What did you do initially?

A I operated in a number of different fields of law for the first three years. Since that time I have concentrated on that field that I mentioned.

Q Are you a member of any organizations or groups or committees relating to your professional activities or—

A Yes. I am currently a member of the Federal Regulation of Securities Committee of the Business Law [223] Section of the American Bar Association.

I was formerly for three years a member of counsel of that section.

I was formerly a governor at large of the National Association of Securities Dealers for three years.

Q Any others, sir?

A Well, I am currently a member of the advisory counsel of the American Law Institute Code project on Federal Securities Regulations.

In the field of Federal Securities Regulations, I don't currently remember any other committees.

Q All right, sir. Through your activity and practice and as a member of the Securities and Exchange Commission, Mr. Wheat, do you have a general familiarity with the Williams Act?

A I do.

Q With state tender offer, takeover statutes?

A A general familiarity, yes.

Q Do you have a general familiarity with the procedure which is used in cash tender offers both by offerors and target companies?

A Yes.

Q When you were on the Commission, the Securities and Exchange Commission, what years did that in- [224] clude, incidentally?

A 1964 through 1969.

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[226] • • •

Q Mr. Wheat, in very fundamental terms, sir, would you tell us what are the various methods by which someone who was interested in acquiring the control of a corporation might undertake to do so?

A Well, there are a number of methods but a very short answer to your question:

One method would be the traditional merger method under state law regulated to the extent of disclosure in some cases by Federal law.

An exchange offer, so called, which involves the offer of securities of the bidding company to a shareholder of the target company.

A proxy contest to acquire control of the Board of Directors and the cash tender offer.

Q In a tender offer, in a cash tender offer, what essentially is the purpose and effect of that successful cash tender offer?

A Well, the effect is to acquire, in typical fashion, to acquire at least a majority or as it's often referred to, working control of the outstanding shares of [227] equity or common stock. The purpose of selecting a tender offer route is quite typically obtaining the advantage of surprise, avoiding the necessity of negotiating with the management of the target company at least in the early stages, an opportunity to conclude the transaction if you are successful, a greater degree of flexibility which often applies and a minimal amount of disclosure used by contrast in one or more respects with the other methods that I mentioned.

Q Is there a difference between tender offer and other methods of acquisition with respect to the situation as viewed by the shareholder where a tender offer is made as compared with other methods of acquisition? How does a shareholder see it?

[228] A. Well, if we're talking about tender offers which are in this sense primarily regulated by the Williams Act, admitting the proliferation that has been referred to as state tender offers, it is quite typical for the shareholder to receive word either through an advertisement in a financial publication or through his broker or possibly through a direct mailing of the tender offer with information about how to respond to the tender offer, information about the cash price which is offered, information about the period of time during which the offer is open to be accepted, procedures for acceptance and disclosures as to the right to withdraw, the right of proration which are contained in the Williams Act.

Contrasting that in a proxy contest there is typically a substantial mailing to the shareholders from both parties. There is typically continued mailings in an effort to retain the shareholders vote or to persuade the shareholder to change his vote during the period of the contest.

In the exchange offer there is a prospectus typically delivered which is a lengthy disclosure document. That prospectus, in a merger situation, would take the form outwardly of a proxy statement which again would be a substantial document and would [229] allow a sufficient time, prior to the shareholders meeting for the shareholder to cast his vote for or against the merger.

In the tender offer situation, of course, if the target company is resisting the tender offer the shareholder will receive at least a communication from the target company to please hold off decision until the target company can present its dues. And in a situation which involves bidding, the shareholder may receive information as to a competing bid.

Q. When there is a tender offer and it comes to the attention of a shareholder, is the shareholder under any particular pressure, immediately?

A. There is considerably more pressure on the shareholder in a cash tender offer, usually, than in these other methods of acquisition or control change. Primarily because under the Williams Act—I'm speaking now without reference to the state statutes—it is possible to confine the tender offer period to a very short period of time. In the event that it is a tender for all shares of the target company, that time could be as short as seven days. A tender offer for part of the securities, it could be as short as ten days. And the tender offer dangles in front of the shareholder, cash, usually at a premium above the [230] current market. So unlike the situation where the shareholders asked to vote on something which is going to be considered at a meeting some weeks hence or to vote upon a matter of who shall be the directors of his company at a future date, a shareholder receives this offer of cash and he is advised that there is a limited period during which he can accept. And if he wishes to take advantage of the offer he must act relatively swiftly. In addition to that pressure simply comes from the the offer of cash as contrasted to these other situations, you have the pressure which comes from the way tender offers are handled in the typical market situation. The tender offeror has typically engaged a dealer-manager, skillful investment banking firm to transmit that offer throughout the country, make sure it reaches stockholders and has agreed to pay a commission to all dealers who bring in shares. That is, who persuade their clients to tender their shares in response to the tender offer. So there is an additional and to some degree one-

sided pressure in the tender offer situation because dealers throughout the country will make a commission which can frequently be very substantial, by persuading their clients to make the tender.

It's a little more difficult for the [231] target company to counter that because I know of no instance in which the target company has agreed nor any economic method of agreeing to pay the counter solicitor sixty cents a share for all shares not tendered. Although I'm sure that if there was a way to do that, some firms would be delighted. So you have in addition, that pressure.

Finally you have your rather indirect pressure of the action of arbitragers who are in the position, because usually their membreship on exchanges and capital situations are to bid up the shares of the target company close to the tender offer price, if not in excess of it.

The pressure is somewhat exacerbated by the element of surprise which is feasible with the Williams Act because the tender, the bidder can plan his bid, engage his investment bankers, develop his strategy and determine upon his price and obtain his financing all in secret prior to making the tender offer and all of that has been developed and is in place and ready to go at the time the shareholder receives word of that offer followed by relatively limited period in which to act upon it.

Q. Mr. Wheat, is there a difference in the role, in the relationship between shareholders and company [232] management in the case of considering the tender offer as compared with considering other methods of acquisition?

A. Difference in the role?

Q. The relationship between shareholders and management of the company as consideration is given to a tender

offer on the one hand and on the other hand as consideration is given to a proposed merger or a proxy fight or otherwise.

THE COURT: You mean obligations owed by management to shareholders?

A. I don't know of any difference.

Q. Obligations but also extent to which shareholders can or would obtain guidance from management about the situation, does that differ?

A. Well, if I understand your question, Mr. McKay, in the merger situation typically the management in this case the acquired company, let's say as analogized, the target company, that management has examined very carefully the proposed merger. Typically the management and Board of Directors of that acquired company has employed outside experts that deemed it appropriate to advise it as to whether or not the proposed merger terms or ratio of securities between the two companies was fair and reasonable, and hopefull [233] the best available. Quite frequently the Board of Directors of the acquired company will engage a skillful investment banking firm to appraise the prospectus of both companies and the prospective market for the shares and advise it as to the fairness of the proposal. And typically, the shareholder of the acquired company is in a position to obtain the advice of the management and Board of Directors of his company as to whether or not this is something he should favor or disfavor together with analogies of the reason why this is a good merger, one that his vote is recommended in favor of. That is also true where you have a sale of all the assets of a company which is another method of merger.

In the case of a proxy contest, of course, you have all kinds of advice being given to the shareholder as to how he should vote and why and what kind of people he's voting for or his vote is requested for in the way of directors.

In the case of an exchange offer of securities, typically there is a substantial period during which the bidder must remain on file with the SEC, their registration statement containing very substantial disclosures about the bidders, his record of operation, record of its management and ample opportunity for the management and Board of Directors [234] of the target company to appraise that situation and advise the stockholders how they should react.

In the cash tender offer under the Williams Act, the management and Board of Directors of the target company have the same obligations, if you will, towards their shareholders but it is more difficult, substantially more difficult for that Board of Directors to react and to appraise the situation carefully to determine whether or not the tender offer of cash is one which should be accepted or one which—as to which they have no opinion or one which they deem inappropriate and undervalued. The problem is that since surprise is a major element of a tender offer under the Williams Act, previously, the target company has to get its Board of Directors together. That may take several days as a minimum. The Board is scattered through some several states. The Board of Directors has to get what information it can about the tender offer from the limited disclosures in the Williams Act and the Board is under severe difficulty in trying to retain adequate outside advice from skillful investment bankers as to whether or not in their judgment this tender offer is full and adequate or

whether or not it's undervalued. That puts an enormous pressure on the investment bankers, [235] if they are to be able to act within the limited periods of the tender offer.

So the relationship is the same, the obligations are the same, the difficulty of executing those obligations are severe.

Q. Looking at the situation of a cash tender offer from a shareholder's viewpoint, Mr. Wheat, what alternatives does he have? What problems does he have with each of those alternatives?

A. Well, if a tender offer is for all of the shares—

Q. First, let's talk about the tender offer for all of the shares then separately, if you would. Tell me whether there are any differences in the case of a situation where the offer is for less than all the shares.

A. Well, if a tender offer is for all of the shares he has a choice of accepting it, rejecting it. Occasionally, he has the choice of accepting it in part, rejecting it in part. And he has the choice of acting within fairly soon after he receives the offer or trying to wait until the end of the line. And the more sophisticated he is the longer he will wait. If it's a tender offer for let's say fifty-one percent of the outstanding stock, usually there is, [236] under the Williams Act, a period of time during which if he tenders and more shares are tendered within that period of time than the shares which have been asked for by the tender, he would be prorated with those shares. If he waits until after that period which under the law is ten days then he is obligated to a first-come, first-serve basis and his shares may or may not be accepted. So that there is more pressure for

him to act more swiftly if he wishes to accept and receive the tender price.

Again, he has the choice of rejecting the tender offer.

Q. If the offer is for less than all of the shares, does the shareholder have a particular interest in that situation, in ascertaining all the facts he can about the nature and history of the offeror?

A. Well, he has that interest in a sense in both types.

Q. Is it more so in this latter case?

A. If he is of the opinion that the price offered is insufficient and the value of his shares is higher than the tender price offered and if his tax situation is such that he is not happy with the idea of going into the taxable capital gains situation which if he sells his shares on that basis he will have [237] to pay a capital gains tax which depending on his—under these circumstances at present could be as high as forty-five or fifty percent of his gain, he is interested in determining whether or not if he stays with the company and does not accept the tender offer, what sort of a management is taking over this company, what's the record of these fellows who are tendering. What is the likelihood that the company will be as well-managed or managed in a less satisfactory fashion than has been true in the past?

If the tender is for less than, let's say, fifty-one percent of the stock he has an even greater interest in that information because of the chance that even though he tenders all of his stock only a portion of that will be taken up by the bidder and he will have to remain a stockholder of that company, so his interest in whether or not he should hold or tender or whether or not there is any other alternative that might come along is in a sense greater.

Q. You referred to a fifty-one percent situation. Would the same be true as to say a forty percent situation?

A. Even more so.

Q. Mr. Wheat, prior to the adoption of the Williams Act in mid-'68, what was the situation [238] insofar as regulations on cash tender offers as compares with regulations of other methods of acquisition?

A. Well, there was an absence of regulation on cash tender offers and substantial regulation of the other methods of acquiring control of a corporation.

Q. And this was—the latter was true under the various federal securities acts, essentially?

A. That is correct.

Q. You were a member of the Securities—

A. Let me add to that that I thought Mr. Bartell described that situation very well yesterday. He did indicate that, of course, as to phases of the cash tender offer, the antifraud provisions of the Federal Securities Act did apply but as to regulation in the sense of administrative regulation there was none.

Q. Were you a member of the Securities and Exchange Commission at the time the Williams Act was passed and just prior to that?

A. Yes.

Q. And did you in that connection give some consideration to the Act in its proposed form?

A. Yes.

Q. What problems, sir, at that time was the—as viewed from the Securities and Exchange Commission's viewpoint which you then occupied, what problems was [239] the Williams Act seeking to deal with, essentially?

A. Well, the Williams Act sought to deal with this absence of regulation by providing at least a minimal amount of disclosure, requiring it. By modifying the potential for what Mr. Bartell described as blitzkrieg tactics, yesterday, by providing at least a minimal period by which the tender —the shareholder could withdraw or if something better came along during that minimal period, which was several days, by providing a period after which he could withdraw if the matter dragged on and was not pursued. By providing a most favorite nation position, you might say, to the effect that if the tenderor raised his bid, the shareholder, usually the less sophisticated shareholder would tender early, would get the advantage of the higher bid which he did not have prior to the Williams Act. And by providing that there was a minimal period during which proration would occur in the event of a partial bid.

Q. Why was it felt necessary to provide for further disclosure by law at that time with respect to cash tender offers?

A. Well, for the general reason that prior to the time there had been essentially no disclosure requirement and it was felt by the sponsors of the [240] legislation that some disclosure was desirable.

Q. Were there any historical facts or reasons brought to your attention at that time as to why federal action was needed, the excesses or situations which required specific rectification by those—

A. We were familiar with a number of instances in which, what Mr. Bartell referred to and what has been typically referred to as blitzkrieg tactics had occurred and been successful. And quite often the party engaged in those

tactics, in our judgment, was not necessarily one of the, let's say, best managed companies in the country. We thought that a minimal period at least of prenotification at least to us to review those disclosures was necessary. We sought such provision under the Williams Act and the sponsors for the legislation did not provide it.

* * *

[241] * * *

Q. (By Mr. McKay) Mr. Wheat, the Williams Act set out to give any new rights to offerors they didn't have before that Act?

A. Rights to offerors?

Q. Yes, sir.

A. No.

Q. Was the Act intended in any way, as you saw it from the SEC vantage point, to encourage tenderors?

A. No.

Q. Was the Williams Act regarded by you, from the SEC vantage point, as being a full solution to the problems you have described that existed before that Act?

A. Well, the Williams Acts was a Congressional reaction to a situation which had arisen. It was a first step, I think. I certainly did not at the time consider it to be a final solution. I'm not sure anybody did.

Q. Did it in any event solve the problems which you have described it undertook to deal with?

A. In my judgment, it did not.

[242] Q. What did it do as far as dealing with those problems, in general?

A. Well, as I have already testified, it provided certain regulation relating to rights of withdrawal, parition (phonetic spelling) and offering to all shareholders the benefit of a raised bid, and it provided minimal disclosures.

Q. Did it require a certain filing with the SEC?

A. Yes.

Q. Are the materials which are filed with the SEC under the Williams Act reviewed by the SEC prior to the effective time of the tender offer?

A. No.

Q. How does this compare with the situation with respect to registration statements and matters filed in connection with proxy fights and so forth?

A. If you have a registration statement at present, proxy statement which is part of that registration statement in connection with a merger or a sale of assets, that's reviewed carefully by the SEC before it is permitted to become effective. Proxy contest situation, there is some review by the SEC of the proxy materials.

In some instances, that review takes [243] place after the proxy materials have been forwarded to shareholders if you were in the midst of the contest. *At the outset of the contest, there is prior review. In the tender offer situation, there is no review.*

Q. Mr. Wheat, in general terms, what do the state corporate takeover statutes do that goes beyond the Williams Act?

A. Well, they do four general things. First of all, they require larger, longer period of time during which the tender offer must be publicized and open, which permits the management and Board of Directors of the target company to react, to obtain advice and information and to get that information out to stockholders. It also permits

the introduction into the bidding of additional bids. They require additional disclosure, doing beyond those required by the Williams Act, primarily disclosures which would give further information to the shareholder about the financial record and other record of the bidding company. You have a better idea what kind of an outfit it is.

They introduce the administrative process to the picture by requiring an administrative review at the state level prior to the time the tender offer itself becomes effective and is transmitted in official form to shareholders, either by advertisement [244] or directly, and they include, most of them include a provision which, in essence, requires all shareholders of the target company to be treated equally.

Q. Would you elaborate on that?

A. Which?

THE COURT: The latter.

Q. (By Mr. McKay) Take the latter one, first.

A. Well, under the Williams Act, *it is possible to make a tender offer which goes only to certain shareholders.* Let's say it *omits the shareholders in a given state or states.* That is not the way I would interpret the requirements of these state laws that I mentioned which require certain—*all shareholders be treated equally.*

In addition to that, there is an unsettled point under the state statutes. Under the Williams Act, the administrative construction has been that it is possible and not in violation of the Act for the ordinary shareholder to be paid the tender price, but for the shareholder who is an arbitrager and who has bought up the shares usually during the tender period with a view to tendering them at the close of the tender period to receive not only the tender price but also

the special commission to dealers, which is quite typically sixty cents a share, [245] thereby obtaining the larger price, in a sense. I don't know a decision in the state laws which has held that that's in violation of the requirement that all shareholders must be treated equally, but I would be surprised if that issue were not raised, and I would be surprised if it — that situation would be permitted to continue.

Q. Yesterday Mr. Bartell testified, and I believe you heard him, that one of the advantages of the state Acts, as he saw it, was the fact that more time was afforded to shareholders. Do you share his view that that is a desirable aspect of the state statutes?

A. Yes, I do, both from the standpoint of affording more time to the shareholder to think about what he wants to do and to obtain advice from his broker or from his financial adviser as to whether or not he should tender all or part of his shares or should hold on to them, and a factor there, of course, is to obtain advice from his tax adviser because the cash tender is invariably a taxable transaction; whereas, the other method of changing control, particularly if they involve an exchange of voting stock, acquire typically tax-free transactions.

So they do not involve the shareholder [246] in the problem of having to pay additional taxes and how that fits into his taxable—his tax scheme, if you will. So there are these matters which a shareholder ought to have enough time to react to, and quite often, in the blitzkrieg tactics, he does not have that time. In addition, I think it's even more important that there be an opportunity for the Board of Directors of the target company to react in a consid-

ered way. Too often in the blitzkrieg type tender offer or the tender offer which is not subject, for one reason or another, to the state statutes that extent to time, the Board of Directors reacts in a knee-jerk fashion. It just says, what do you guys in the management want us to do, and, of course, the management particularly doesn't like the tender offer because it's liable to be replaced. So the Board, without adequate information or opportunity to obtain advice from skillful people in the financial community about the—about what the shareholders are likely to be able to get reacts in a ill-considered fashion.

If there is some more time, the Board of Directors can and should review the tender offer carefully, obtain adequate advice and react in a calm and deliberate fashion as to whether or not this tender is in the best interest of the stockholders or [247] not.

Actually, I think one of the problems with the cash tender offer is that it diminishes the opportunity for a Board of Directors to advise the stockholders, which is one of the important roles of a Board of Directors and is fully implemented and utilized in the merger situation where the Board has a chance to negotiate for the merger ratio, obtain the best that it can for the shareholders and then advise the shareholders as to its recommendation. What this does is to involve two sophisticated and competent groups of businessmen in a negotiation, which usually produces a good result. The Board of Directors of the acquired company and the management and/or Board of Directors of the acquiring company negotiating at arms-length for the best deal each of them can obtain.

One of the problems with a cash tender offer is that it diminishes, if not eliminates, that opportunity for negotiation, and, therefore, you have the unsophisticated individual shareholders of the target company faced with a carefully prepared cash tender offer developed by a very sophisticated management.

Q. Do you feel that the additional disclosure, [248] which is one of the areas where you mentioned the state statutes went beyond the Williams Act, that that is a desirable thing?

A. My own opinion is that some additional disclosure beyond what is currently mandated by the Williams Act and the SEC would be desirable, particularly in the case of the tender offer for less than all shares because there it is critical to the shareholders to know something more about the outfit which is going to take over what is a majority control of his company under circumstances where it is likely that he will remain a shareholder.

In a sense, in that circumstance, the shareholder faced with a tender offer is in a position of casting a vote for a majority of the Board of Directors of his company because if he tenders his shares and the tender offer is successful and a part of his shares are taken up, since enough shares are tendered to meet the requirements of the tendering company, a change in the Board of Directors will occur, and new management, in the sense of a new Board of Directors, will take over.

It has long been thought that in a case which the shareholders asked to vote upon a change in the control or upon a director situation, vote [249] for directors, he should have substantial information before he votes.

Q. What about the—

A. I would—Excuse me.

Q. Excuse me, sir.

A. I want to add to that question. I am not satisfied that as much disclosure is required as is apparently required under some of the state statutes. In other words, I think it's entirely reasonable to conclude that some of them go too far.

Q. What about the administrative review which exists under the state statutes you mentioned as a change in addition beyond the Williams Act, do you see that as a desirable change?

A. I think some administrative review is desirable. In the absence of administrative review, you're simply relegated to courts. Everybody is suing everybody else, claiming that the disclosures are inadequate, and the courts in this country are adequately burdened as it is.

The administrative review process has worked very well in the case of other aspects of the securities transactions and the securities markets, and what the state statutes have done is to introduce an element of administrative review of the disclosures, [250] which was not present.

Q. You mentioned the four respects in which, generally speaking, the state statutes do things which goes beyond the Williams Act. Do you regard these as essentially supplements to the procedures set forth in the Williams Act?

A. That is the effect of the state statutes because the Williams Act is in operation, and the state statutes add these additional elements, not otherwise present.

Q. Are you aware of any situation in which compliance with the state statutes would make compliance with the Williams Act impossible?

A. I don't know of any such situation. It would surprise me if that occurred. If there is some aspect of the Williams Act which, for some reason, cannot be implemented because of a state statute, I think a conference with the Administrator of that particular state would swiftly dispel that problem.

Q. Mr. Wheat, do the state statutes in any way prevent tender offers?

A. No, they do not.

Q. What effect does a tender offer—I'm switching gears now. What effect does a tender offer made under the Williams Act have on the market?

[251] A. Well, the effect of a successful tender offer under the Williams Act or any other Act or, for that matter, in the absence of regulation, typically reduces the quality of the market for the securities.

Quite typically, if you have a successful tender offer for fifty-one percent or sixty percent or what have you of a stock of a company listed on the New York Stock Exchange, the remaining round lots and distribution of shares after the acquisition of that block, that controlling block, may not be adequate to meet the standards for the market on the New York Stock Exchange.

These shares are delisted from that market and are relegated to the over-the-counter market If the tender offer is for shares that are traded on the over-the-counter market, the remaining shares and the remaining number of shareholders may be insufficient to qualify for the national list of the NASD, and you are relegated to local lists and less market information provided by fewer publications, and, of course, in every one of these instances, a market with less depth and liquidity because there are

fewer trades and transactions because there are fewer shares in the float. So successful tender offers result in the diminution of the market.

[252] Q. Do the state statutes, state takeover statutes have any effect on that situation?

A. Well, I don't think they affect that situation because a successful tender offer under the state statutes will have the same impact as a successful tender offer in the absence of a state statute, but in another sense, you might say they have some impact.

In any market, I think the test of a good market is a market which brings together, let's say, all potential buyers together with all potential sellers at about the same time so as to result in the best, let's say, economic price.

What the state tender offer statutes do is to extend this time period during which the management and Board of Directors of a target company, as I indicated, can react to the tender offer, and during which time, other potential bidders can take a look at the situation. They typically are surprised by this tender. There is then an opportunity for them, if they can study the matter quickly enough and determine upon whether or not to bid, to come in with a competing bid or bids.

As a result, therefore, of the extended time period, you are able to bring into the market, if you will, for this block of stock, a market for the [253] shares being tendered to you, additional bidders to match up with the shareholders who are trying to determine whether or not to sell, and as a result of that, you have a better market in that sense than you have when the bidder has an opportunity to gain complete surprise and to conclude his bid sufficiently fast that

there is really no time for competing bids to come into the picture.

Q. In this case the Plaintiff in one of its briefs has asserted that the state corporate takeover statutes operate to impede the market. Do you have a reaction to that, sir?

A. Well, I don't think that's a fair statement. A tender offer is essentially an offer outside the market, the pre-existing market for shares which is made up of persons trading for the securities in the ordinary course, and sometimes blocks being traded by larger investors, and as I indicated, the successful tender offer will diminish the quality, the depth and liquidity of the market. So I don't think it's a fair statement to say, as you indicated, that a tender offer is injurious to the market.

THE COURT: Do you agree with Mr. Bartell's testimony in substance that the takeover statutes might have a chance to [254] reduce the original offer made by the acquiring company?

THE WITNESS: Well—

THE COURT: Did you hear his testimony?

THE WITNESS: Yes, I did. Let me answer that question, perhaps, in two ways.

THE COURT: All right.

THE WITNESS: I think that state tender offer statutes, taken kind of as a whole, this group of statutes probably do have a deterrent effect of a sort upon the initiation of some tender offer. I don't think there is any question about that. They will deter, particularly the blitzkrieg artist, if you will, who is interested only in a tender offer if his—if he's able to do it with surprise, swiftness and essentially making it difficult, if not impossible.

THE COURT: Make it a tender trap?

THE WITNESS: For—That's a good way to put it. For competing to come in. Ordinarily, if a—the state statues, I think have a tendency to, if you will, by the requirement of additional time, bring into that picture additional bids assuming [255] that the tender—original tender offer is at, let's say, a bargain price, one which is really not in the best interest of the shareholders who are on the receiving end, and in that sense, it enhances the likelihood of tender offers and additional tenders in situations where an initial tender offer has been made.

[272] • • •

Q. I didn't understand you earlier. You are not opining that cash tender offers should be discouraged [273] are you, in the context of American economics?

A. Most definitely not. I think the cash tender offer is a very legitimate business procedure which has its—has its place and of course, regulations should be such as to protect the best interest of the stockholders of those potential target companies.

Q. The point I'm making is that there—at least when we characterize not an infrequent number of instances, there is very little surprise involved because the company has previously identified itself as a target, whether or not it elects to take offensive steps itself, at least it identified itself as a potential target?

A. Yes. If the company is smart enough to have identified itself as a target then the tender offer may come as no surprise.

[274] Q And then as a result of the many and various defense tactics that are available after a tender offer is made, isn't it a fact that the time constraint or the minimum times specified in the Williams Act are very rarely, very rarely actually utilized? Perhaps that's not clear.

A No, I understand it, counsel, I think, and I think you are correct. I think on the average the tender periods under the longer, in some cases significantly longer than the minimum periods which are permissible under the Williams Act. Certainly if you're dealing with a sophisticated management of a target company which has previously identified itself as a potential target and has taken these precautionary steps to deal with the tender when it comes and it will come as a surprise in a sense because even though you may expect a tender you have no advance notice under the Williams Act as to when it's going to happen. So, your preparations are necessarily coent (sic) to that extent.

Nevertheless, under those circumstances it's impracticable to make a tender offer and achieve success within the minimum periods.

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THE COURT: Is there a sense of loyalty between shareholders and management that the tender offeror has to overcome, in your opinion?

THE WITNESS: I would say that in some instances, yes, and in some instances it's very difficult to find that sense of loyalty. In some companies shareholders who have bought the [282] company stock, let's say, when it initially went public at a relatively higher price compared to today's price and have seen their shares multiply in value and have a strong sense of—that the company's management has done an awfully good job for them will have a loyalty to that management which at least will

translate into a serious question as to whether or not they want these fellows from New York to take over this company.

THE COURT: Better use another state.

THE WITNESS: With no reflection on any person present.

On the other hand, I would say that in many cases what a shareholder is principally interested in is the price that he's going to get and if it's substantially above the current market price and he is not persuaded that the company is about to receive a bid which is a higher bid than that or other securities which are of equal or greater value, his tendency—very strong tendency is to accept that bid and accept it as swiftly as he can.

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[285] • • •

Q The Williams Act was passed in 1968, is that correct?

A Correct.

Q Do you recall when the first act was introduced or when the first bill was introduced in Congress which undertook to regulate tender offers?

A Not specifically but I believe there was one introduced as early as 1966.

Q Could have been '65?

A Could have been '65.

Q Do you recall anything at all in your tenure on the Commision about what the terms of that Act were?

A As I recall, one significant term of that Act was a twenty day prefiling period in advance of the effective date of the tender offer similar to many of the state laws and

that was ultimately rejected by the sponsors of the Williams Act.

Q The committee not only rejected it but ultimately the sponsors of the Williams Act—but the committee itself did not like that at that time period, did it?

[286] A Well, the Commission recommended a five day prefiling period for review by the Commission of the disclosure materials.

[287] Q And did the commission testify before Congress concerning that—

A We did.

Q —that matter? That provision, likewise, did not find its way into the Williams Act, did it?

A Right.

• • •

[289] • • •

Q Congress, likewise, considered the extent of disclosure which would be required by an offeror under the Williams Act, did it not?

A It did.

Q And I think even went so far as to consider or at least take testimony on perhaps the advisability of requiring something similar to S-1 or registration type disclosures?

A I don't remember the—

Q Is that correct?

A —testimony that precisely.

[290] Q In any event, the commission at that time took the position that at least disclosures to that extent would not be desirable, did it not, disclosures to the extent of an F-1 or registration disclosure?

A I'm not sure that I can say that. The commission interfaced with the Williams Committee in a sense of commenting upon the value and usefulness of the proposals of the committee and any particular proposal that the commission believed to be ill-founded, but I'm not sure that I recall any discussion by the commission with the committee to the effect that disclosures going beyond what the Williams Act required were ill-advised.

Q In any event, prior—

A It was a delicate kind of relationship, if you will.

Q But I take it that, in any event, while you don't remember any specific conversations, at least prior to the passage of the Williams Act, the whole matter of disclosure was considered by Congress?

A I believe that's correct.

Q The third item was that the acts required administrative review. Is that correct? Was that the third—a third distinguishing characteristic?

A (Witness nods head.)

Q Again, do I properly understand that the [291] Securities and Exchange Commission proposed to Congress in the debates on the Williams Act that prior administrative review be afforded?

A Correct.

Q And what was rejected by Congress?

A That is correct.

Q And finally, I think the fourth general aspect you commented on was what the state acts provided that all shareholders are to be *treated equally in a* tender offer.

A Many of them do.

Q I understand then that not all the state tender offer statutes have that provision.

A Well, I couldn't tick them all off for you, but I know many of them do contain that provision.

Q In *your estimation, though, I take it the Williams Act does not so provide?*

A Correct.

Q Did I properly understand that your concern there is the fact that the arbitragers maybe allowed an additional fee for their tender of shares?

A I'm not sure that I am expressing my concern. I was simply saying that one of the things that the state statutes which contain that provision do, going beyond the Williams Act, is to provide this equal treatment [292] of shareholders. Whether good or bad, they do that, and one feature of the administration of the Williams Act appears to me to permit this fee to be paid to those shareholders who have been in the arbitrage function, and I doubt that was—would be permissible under a construction of those state statutes.

I am not intending by that to derogate from the function of the arbitragers. I think they perform a very valuable and useful function in the markets, and in the tender offer area, a particularly valuable and useful function. So I am not qualitatively assessing this question. I am merely pointing what I believe these state statutes do beyond the Williams Act.

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[295] • • •

Q The Congress in passing the Williams Act did seek to achieve and did at least say that it was seeking to

achieve a balanced treatment between the offeror and the target, the incumbent management, did it not?

A At the time of the adoption of the Williams Act, Senator Williams certainly did say that, and I'm sure that that was his genuine objective.

Q And you wouldn't disagree with that as a policy, would you?

A I think it's an admirable policy, but I would say that because wisdom comes late is not necessarily a good reason to deny it.

Q That is, you disagree even though Congress [296] determined that it was following a balanced course, you disagree with that?

A I certainly do.

Q You are aware, are you not, that Congress has considered many of these same matters that it rejected in the course of passing the Williams Act very recently are you not?

A Well, I am aware of the fact that in the context of the gigantic mass of amendments to the securities laws recently adopted by the Congress, there are primarily focused on the mechanism for instituting a so called national securities market.

There were various amendments, some of which affected sections 13 and 14 of the exchange act. I'm not sure how closely the Congress focused upon changes in the basic structure of the Williams Act in the course of that examination, but I would say they generally focused upon the higher panopaly of the securities act.

Q Are you familiar with what is known as the Hart-Scott-Rodino Act?

A I am.

Q And in that act, correct me if I'm wrong, there is a provision that in the case of tender offers, there will be a longer delay between the making of the actual offer and its consummation than is presently provided for [297] in the Williams Act, give a chance for an anti trust review. Is that correct?

A That is correct in the case of companies with an excess of a million dollars of—Is is sales or assets? I can't remember which—acquiring companies in the ten million dollar range. I believe a fifteen day minimum period is required, and the Justice Department has authority automatically to extend that to twenty-five days.

Q All right, and that is a waiting period, though, between the time that the offer is made and the time it can be consummated. Am I correct? It's not a preclearance—

A I'm not sure, but what—if you were subject to one of these state statutes that requires a prenotification prior to the time the offer can be made, I would think it would be possible to give your notification to the justice department, start that period running sometime prior to the time they actually make the offer, but I'm not sure of that point.

Q All right, but insofar as the Federal Government and Federal regulation is concerned, the Hart-Scott-Rodino Act still does not provide for a prenotification administrative review?

A I don't think that's required at all.

[303] • • •

Q. You mentioned in direct, earlier today, that the State Takeover Acts in your opinion do not prevent takeovers.

A. Correct.

Q. They could conceivably, could they not?

A. Well, I suppose it's conceivable that a takeover which was in violation of the state statute which was held to be applicable and which was enjoined by that state's courts for that reason, could thereby be prevented.

Q. All right. So a state could conceivably prevent a takeover that in all respects complied with the Williams Act?

A. Yes, that is entirely possible simply because of the differences between the state—the particular [304] applicable state law and the Williams Act.

Q. You are aware, are you not, that there is at least a body of opinion which I think Mr. Bartell discussed some, to the effect that the State Takeover Acts have some discouraging effects upon tender offers.

A. I am aware of that opinion.

Q. That's simply an opinion with which you personally do not agree?

A. Oh, I testified this morning that I believe that it is true that the State statutes, as they presently appear, do in fact have a tendency to defer some tender offers. And part of the reason for that is the—the differences, the kind of mixtures of differences in the state stautes and I would therefore applaud the efforts of Mr. Bartell and other State Commissioners to achieve uniformity as a very desirable objective among the state statutes. Such efforts are in progress.

Q. If there were no state statutes, are you informed that regulation of tender offers would have been achieved by the Williams Act?

A. That's correct, subject to the proposition of course, that in our federal system there is a substantial place reserved for the states and for state law enforcement and

it's entirely possible that a sleepy [305] federal bureaucracy could fail to act in a given tender offer whereas the state, with a nexus with that tender offer could find a violation of its general antifraud provision of its state laws and enjoin the offer. So total uniformity is not achieved in our federal system.

Q. In that sense, that uniformity may never be achieved?

A. That is entirely correct and may be desirable.

Q. I was a little confused about your discussion this morning concerning the market effects of both takeovers and of the State Takeover Acts themselves. I understood you to say that the State Takeover Acts have an impact on the market which is a good impact by virtue of the fact that they extend the time within which the parties may look at these offers. But, I'm confused as to how they—what good effect it has on the market.

A. Well, I was really talking, Counsel, about two related markets. First of all, there is the general trading market for the securities of the target company and that market will, of course, react to a takeover bid. But, for practical purposes that takeover bid is an unusual event outside the regular trading markets. That bid does not go right to the [306] market and start buying up shares, it's something which is even under the Williams Act takes some time. On the other hand, there is another sense in which this matter affects the market and that is the market for a major block, a controlling block if you will, of a company. It's very difficult to buy a controlling block in the ordinary trading market because, as you go in and try to buy shares, the buying power will drive the price up to a point at which it becomes uneconomical to continue to buy shares. So it's

difficult to use the usual trading market to acquire a block which will give you control of most markets. Ordinarily a tender offer is made and ordinarily swiftly and outside the trading market—of the normal market to acquire this controlling block. Now, what I was trying to say was that in order to achieve what is generally referred to as a good market for anything you want to try to bring together those people who are in a buying phase who are looking to buy and those people who are looking to sell and here you have a controlling block that you're talking about. And if under the Williams Act, for example, a bidder can ram through swiftly a tender offer before there is an opportunity to bring into that market for that controlling block other potential bidders who may be [307] very much interested, but who obviously take a little while to gear up and have a look at the situation, then you do not have a good market because you have by definition failed to bring together those who are or have an interest in buying to those who have an interest in selling. To that extent and in that limited context, the state tender offer statutes provide a better market.

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[309] • • •

Q. You say that the state takeover statutes have in your opinion many defects. Would you tell us what defects you see in the state tender offer—state takeover statutes other than what you've already testified to?

A. Well, let my try to be rather general about that.

I'm very doubtful about the desirability of a provision that permits the target company at will to obtain a hearing. I would much prefer to have the Administrator of the state

statute have discretion to call a meeting if he or she deems it necessary to have a hearing on the disclosures. So I would oppose that feature of the state statutes. As I indicated to you, the jury is out with me on prenotification. I [310] haven't really made up my mind as to whether that is something than can be tolerated in light of the benefit of a longer period or whether in an ideal state statute or federal statute for that matter, if the federal statute could be amended, a longer period should be provided commencing with the date of the surprise and the notification of the tender offer. And that's a very debatable point and my inclination is to believe that the best solution would be to have that longer period commence with the announcement of the actual tender offer with a substantial period during which no one would feel or be under pressure to tender, as is the case today.

I have doubts as I previously indicated as to some of the disclosure requirements of some of the statutes. Some of the statutes don't have disclosure requirements and some of them do and they are very extensive. I'm inclined to think that the ones that have none have not gone far enough to counter the defect in the Williams Act and others have gone too far in requiring a massive mass of disclosure comparable to Form S-1 which I don't think is desirable or necessary.

• • •

[313] Q. Mr. Wheat, we've talked obviously at great length now both on your direct and cross about the matter of time, whether it's pre-offer time or post-offer time, you're not prepared to say which is the better, but you believe that there ought to be more time.

Of course, the Williams Act provides for no pre-offer clearance and potential time period of seven to ten days. State tender offer statutes provide for twenty day waiting periods or waiting periods plus hearings and the like; is that correct?

A. And for the post-offer time periods in a number of instances.

Q. How much time is necessary in your estimation?

A. Well, I would preface my comment by saying that there are probably others whose judgment on this subject would be better than mine but based on my own experience I would say a period of thirty days would be about the right balance. And I would like to see no shareholder under a money pressure to accept and turn over his shares before that period is ended.

Q. Mr. Wheat, the record will show Great Western first met with Sunshine board of directors on March 18, that on March 21 it announced the possibility of a tender offer.

[314] The record will further show that as of today's date the Sunshine board of directors has not made any recommendation of any kind of Sunshine shareholders.

Since there have been two months or a little bit better, is that enough?

A Well—

THE COURT: You said thirty days?

THE WITNESS: I said thirty days was my judgment, a good balance. I can't comment on the particular specifics of this case. I would assume that to some degree one might guess that the failure of the Sunshine board to act has been delayed by the progress of this litigation.

* * *

Transcript of trial proceedings:
Testimony of William E. Chatlos, witness on behalf of Defendant Idaho officials—Direct examination

Cross examination at p. 373

[319] * * *

DIRECT EXAMINATION

BY MR. McKAY:

Q Would you state your name, sir?

A William E. Chatlos (spelling) C-h-a-t-l-o-s.

Q Address?

A 165 Grandview Avenue, North Caldwell, New Jersey.

Q What is your occupation?

A I'm a principal of the firm of Georgeson and Company.

Q Would you spell that?

A George-son, one word.

Q And what does Georgeson—is that how you pronounce it, Georgeson?

A Well, the gentleman died in 1945 so I'm not sure.

Q What does Georgeson and Company do?

A We specialize in the relationship between publicly owned companies and their owners.

[320] Our business is generally broken down into two areas; the solicitation of proxies in which we are the largest firm. In 1976 we solicited for 450 campaigns including fifty tender offers which included thirteen exchange offers and the remainder, cash offers, half of which were hostile. The other side of our activity includes the management of corporations and their investor relations activity in which area I am in charge.

[321] Q. What services does Georgeson and Company provide with respect to tender offers?

A. We have represented both offerors and targets both as to advanced planning and as to the sudden, hostile offers.

THE COURT: You are one of those companies Mr. Wheat testified about?

THE WITNESS: I suspect so, sir.

THE COURT: All right. Thank you very much.

Q. (By Mr. McKay) What are your personal responsibilities and functions at Georgeson, sir?

A. As I have indicated, I am in charge of the consulting activity, and this relates to the investor relations, programs and activities that Mr. Wheat referred to that we sometime put on on behalf of corporations, and in addition, we work with any special activities within the corporate domain, including takeovers.

Q. Have you done any writing, Mr. Chatlos, for publication?

A. Yes, sir, over the years, there have been a number of articles written ranging from investor relations practices to takeover activities. I run surveys on takeovers, and also we run—I'm sorry. I [322] meant to say seminars on the takeover activity.

Q. Have you had publication in any particular journals?

A. Well, I suppose within the last couple of months, my views have been expressed in the *New York Times, Dun's Review. Public Opinion Quarterly* has written a couple of things, yes, sir.

Q. Have you done any teaching, sir?

A. I have been a guest lecturer at a number of colleges.

Q. Would you mention a few of those?

A. The Harvard Business School, Columbia University, others.

Q. Do you belong to any societies or organizations which relate to your professional activity?

A. I was a founder, past president and director of the National Investor Relations Institute which is a group of professionals in this field who gathered for further educational advancement. I am a member of the AMA, Public Relations Society of America and have been on various special consulting groups in those areas.

Q. Have you personally, Mr. Chatlos, had any involvement with the enactment or consideration of State Takeover Statutes?

[323] A. Yes, I have appeared as witness in two states and have been consulted in maybe ten or more other states.

Q. Is Georgeson and Company retained by Sunshine Mining Company in connection with the proposed Great Western tender offer?

A. Yes, sir, I understand that it is.

Q. Do you personally have anything to do with that retainer?

A. No, I know nothing whatever about it other than it is in the house somewhere. As I mentioned with four hundred fifty campaigns a year, these things are allocated and —except for knowing it's in the house, I don't know anything about what's going on.

Q. Mr. Chatlos, have you made any analyses of various facts with respect to hostile tender offers in recent years, you or Georgeson?

A. Yes. Actually, this was occasioned by the proposals that came out of the SEC last September. These proposals

suggested certain alterations of the rules, and, frankly, I did what I thought the SEC certainly did, but found that I was wrong and certainly should have done before proceeding with those proposals. I took those proposals and applied them to past history, the net result being that in the absence of state laws [324] and on the basis of current SEC law and even the proposals made last September, if the SEC law alone prevailed in the last two years alone, stockholders would have been deprived of something in excess of a hundred fifty million dollars that incrementally accrued because of takeovers.

• • •

[331] • • •

Q. There was also discussion, which I believe you heard, with respect to the proposition that where a management of a company had identified itself as a possible target—

A. Yeah.

Q. —for a tender offer, that thereupon, it had a position of advantage. Do you have any knowledge on that subject, sir?

A. Well, the record doesn't indicate—does not [332] indicate any advantage at all. While it may be from an academic point of view advantage to realize ahead of time that you might be susceptible, the fact of the matter is that what I call the corporate karate syndrome applies here. I've used that term for a number of years, corporate karate sort of being a hopefully a cute way of saying that the very strengths that make a company susceptible rebound to its exact weakness in trying to defend.

Let me explain that, if I may. Prudent corporations operate in a rather meticulous way. Decisions are not made

easily. They don't shoot from the hip. They don't react in an instantaneous way. The corporations accumulate information, weigh information, evaluate, maybe run a test run, have committees look at it and maybe have some pilot models made out of it.

THE COURT: Sounds like the Government.

THE WITNESS: And eventually make a decision, rightly or wrongly, a decision is made.

Interestingly enough, this is the way the offeror creates its own activities. Under cover of night, it takes as much time as it likes in a secret way to develop [333] information, weigh it, determine its best timing, determine its best strategy, and then a corporation on a surprise, sudden, emotional basis—panic may also be an applicable word here—is suddenly faced with a decision-making capacity totally foreign to its years and years of experience.

It's completely unprecedented that it should have to make a decision of this magnitude shooting strictly from the hip, so to speak. There is no time to create information. There is no time to weigh it. There is no time to call Board meetings.

As a matter of fact, one of the booby traps that we find as Mr. Wheat said when we go in and try to help companies, if you have a—and many companies do—if you have a condition that a Board meeting cannot be called except with five days notice, sometimes a week notice, what do you do if you get an eight-day blitzkrieg?

You really can't even call a Board meeting without problems to those Board members because of official notice requirements, et cetera.

[334] So it is very, very difficult, and any corporation has been under extreme stress to react under a short

period of time under most difficult conditions, even if it anticipates ahead of time that it might be susceptible.

Q. (By Mr. McKay) Mr. Chatlos, you've told us that the frequency of success of target companies in remaining independent, according to your studies, does not seem to have been effective one way or the other by state statutes except that you assume that, logically, the success is greater under state statutes because there are some restrictions there. Is that what you said, roughly?

A. I didn't analyze it from that basis. I believe that's true.

Q. You regard it essentially as not a significant factor on the degree of success?

A. Well, if you assume eighteen to be the number, you have a percentage figure of three out of eighteen in 1976. That's not a very good factor record for those of us who sell a service trying to defend corporations in that regard.

Q. Well, if there is not much benefit in the state statutes, from that respect, in other words, it [335] doesn't matter too much as far as retaining independence in your judgment, what, if anything, is the benefit from the state statute, vis-a-vis shareholders, vis-a-vis the company?

A. Well, I believe I indicated earlier, the sole benefit that we were able to develop was the increments developed as a result of competitive activity within the corporate market place in assessing truer value of the target company. May I elaborate on that?

Q. Please.

A. The —

Q. First of all, let me understand. Are you saying, in essence, the shareholders get more money?

A. Much more money.

Q. All right. Now, please elaborate.

A. And it is a matter of the survey and the record which anyone can look at. The problem, really, involved here is that takeovers are basically an economic opportunity, and only economic opportunists participate. The object, and we have represented these people. The object is to buy something as cheaply as you can and as fast as you can and get away as quickly as you can before somebody else smells what the game is about and can join in and throw another bid into [336] the pot.

The net result is that, obviously, the shorter tender period, and more opportunity for success for the original offeror. We must look at the economic balance that we find here because these ambitious people have existed in all of the time I have been in on Wall Street, at least. So there is no change in that.

The change, really, is in the economic elements. I mentioned that in 1970, '71, '72, there were very few offers. This was not because there was a lack of ambitious people. This was because the price earnings ratios were very low, and you may remember, we had a cash crunch.

The economic capability of success was simply not available. Today we have almost pure, almost perfect economic guidlines.

While PER's still remain low, and that's the one outstanding negative feature, the cash is readily available, and the market place is ideally suited to being raided.

I might go on with that. Mr. Wheat, I think, referred to the fact that the shareholder has abandoned the market place.

To that extent, the financial community, [337] the SEC, indeed, must take responsibility for driving the share-

holder out of the market place. The SEC, indeed, encouraged the rise of the institutions with a net result that today we have very few individuals in the market place and a follow-the-sheep syndrome of the major institutions in following what's been termed the nifty-fifty, the net result being that most stocks, not only on the over-the-counters, Mr. Wheat said, but including the New York Stock Exchange, most stocks are characterized by one single factor, which I believe proves the points I'm just trying to make, which is a thin trading volume.

There's nobody buying or selling. The individuals are out of the market, and the institutions either won't or can't take an interest.

So the net result is the market simply drifts off and bears less and less reflection to true underlying worth than probably ever in the history of the stock market.

There is the beautiful economic opportunity for the sudden, surprise, hostile raid, get in and get out quickly to steal something.

The concern here is what about the stockholders? The country as a whole is most concerned about a capital gap, capital formation gap, and [338] at the same time, we have driven the individuals out of the market place, and now we are seeking to deprive the individuals as much as possible of the differential between an ineffective market and true value, and then we wonder why the individuals don't come back into the market place. The reason is rather clear. They are not stupid.

We must find a means to pay attention—

MR. IRWIN: Your Honor, I am just going to ask that a question be asked rather than just a continuing narrative. I never know where it's going.

THE COURT: Well, I don't either, but it's interesting.

MR. IRWIN: Oh, it is interesting.

THE WITNESS: I will conclude, sir. I'm sorry.

MR. IRWIN: I quite agree.

THE COURT: He's concluded.

MR. IRWIN: I just wish we could get a question asked occasionally.

THE WITNESS: If I may, I will just conclude with one sentence. The only way this was going was to indicate the economic opportunity available to those who wish to [339] avail themselves of it. Prices are low. The values are high. Cash is ready. Anybody who wishes to take opportunity of this is liable to gain. It's a wide open game with the exception of the state laws.

Q. (By Mr. McKay) The state laws play a significant role, as you see it, in controlling this situation, minimizing problems or what?

A. The only control that I can see is involved in the state laws.

Q. And would you elaborate on how the state laws help the situation or alleviate problems?

A. Simply—Well, on the basis of what I have previously said, if we go on the premise that we do not have an efficient market place, and we have companies selling at thirty, forty, fifty percent of conservative book, if we go on that premise, then we have to assume that the market place is inaccurate and the only competitive market place we then have is the corporate auction market in which, through the state laws, corporations have the time, and bear in mind what I said earlier, have the time through prudent, practical, reasonable procedures to accumulate information, weigh and assess it, do their job, and then per-

haps on a prudent basis, they can enter into [340] bidding process.

Now, most corporations would not be ungentlemanly enough to make the initial hostile raid. They have no compunctions about becoming an angel, so that an auction process, indeed, empirically does develop once a raid takes place and given sufficient time on—in a general, balanced way.

Q. Do you share then the view of Mr. Wheat and of the gentleman from Wisconsin that the time factor of the state statutes is the very significant value of them?

A. It is the single most significant value.

* * *

[373] * * *

Q —of that fact? So that without that information, without the information concerning the offeror's pricing policy and the reaction of management to the offers made, there is no way in truth and in fact, is there, to a direct connection between the existence of a state takeover statute, on the one hand, and a resultant higher price, on the other?

A In general, I don't think that follows. I could go over the entire list, but I will not. In general, [374] what this shows is that those offers that lasted sixteen days or more resulted in a total net premium to stockholders of over a hundred forty-one—if I reduce it to ten, over a hundred fifty million dollars than the short offers under fifteen days, so—which only involved—which only involved fifty-two million a hundred fifty-six thousand four hundred thirty seven dollar and fifty cents. So that the differential is that the short term offers approximate fifty million dollars in premium to stockholders. The over fifteen day offers, involved in excess of a hundred fifty million dollars in premium.

To me, what that shows is a given period of time in which a corporate auction market can develop results in higher prices for the stockholders.

Q In premium—

THE COURT: Are you taking into account the number of shares for under fifteen days and for over fifteen days?

THE WITNESS: Yes, sir, if you would like to see the form, what we tried to do was put the number of shares involved and here we even went to the company and tried to find out how many were actually tendered as opposed to simply being outstanding, multiplied by the premium that evolved over the original tender [375] price. That is where the arithmetic is out on the figures that I mentioned.

Q (By Mr. Conant) All right. Then, Mr. Chatlos, I wanted to make clear, when you speak of premium as indicated by your analysis, you were talking about premium over the original offer?

A Yes, sir.

* * *

Transcript of trial proceedings:
Testimony of Stephen Craig Metzger, witness
on behalf of Plaintiff—Direct examination

[437] * * *

Q All right. Without getting into too much detail, was there anything said about whether or not our registration would ever be approved as long as Great Western was supporting a reimbursement to Heckla Silver Dollar for these proxy expenses?

A That impression was conveyed to me in that conversation.

Q Well, I don't want to talk about impressions. What was said, as best you can recall, from Mr. Baptie to you on that subject?

A Well, as best I can recall, he kept repeating that the —that $200,000.00 arrangement looked to be a pretty clear violation of that section of the statute which would have the effect of Great Western never really being able to get their registration statement effective.

[438] Q All right. Can you recall what other subject matters, not in great detail, but just subject matters, were discussed with reference to Sections 12 through 15?

A We discussed a little bit about Washington law. There is some comment in the letter relating to the ability of controlling persons to issue additional shares or something which, as we discussed it a little bit, it sounded very prospective and in future of, and in discussing it, I really didn't understand what he was getting at, but I responded by saying something to the effect that, well, number one, there is some New York Stock Exchange rules if you're a controlling shareholder that prevent certain things and require shareholder approval for certain distributions.

THE COURT: What about his comments? That's what we're interested in.

[439] THE COURT: What about his comments though, that's what we're interested in. I'm interested in his comments that he made to you on what his course of action might be.

A. Well, as we discussed in general terms, I tried to get a handle on how we could respond.

Q. What were his comments though, what did he say about what this comment letter was going to include

A. I don't recall any other specifics other than those two.

Q. All right. Do you recall whether or not you heard any statement by Mr. Baptie in that conversation as to what our alternatives would be in terms of either complying with what he said or whatever?

A. Yes.

Q. All right. What was that?

A. Well, he was anxious for us to comply and indicated that if we were to file an amended registration statement on Monday that they would not be inclined to conduct a hearing and that they would hope that the offer could proceed very quickly. He also gave me an indication that there might be some way to cut short the hearing time or that the company might estopped after some period, some reasonable [440] period of time from asserting a right to a hearing.

Q The company, you're referring to Sunshine?

A I'm sorry, Sunshine Mining Company. As I talked with him a good bit more, because I disagreed with him on the $200,000.00 statement more than anything else, I asked him if I could send him a supplemental letter pointing out to him certain things and his response was that supplemental letters really didn't make any difference or anything. What he expected us to do was to make a compliance amendment of the full package, the full registration statement. And if in the amendment we filed we took exception to something he would just call a hearing.

Q So there was no room for negotiation, is that a fair statement?

A Yes.

Q Fully comply with comments in his letter or there would be a hearing?

A Uh-huh.

Q Now, do you recall if you reported this telephone conversation on the 24th to Mr. Boswell on that day?

A I don't think I did.

Q Did you have any discussions with Mr. Baptie on the 25th, the next day?

[441] A. I may have. There was a great deal of difficulty in getting that letter and I think I called him late in the afternoon on Thursday or maybe into the evening and the letter just never seemed to show up. And finally, at one point in the hearing on Thursday he indicated to me that it wasn't going to get out that day for some mechanical problem and that it subsequently didn't show up on Friday morning as he had said that he would try his best to do.

Somewhere in here I suggested that we had a telecopier and he just telecopy it and get it to us. And there was some mechanical problem with Graphic Scanning or something, that I still don't understand, but it resulted in us not getting the letter until late Friday and I may have talked with Mr. Baptie or his secretary or maybe even Mr. Kaufman. I talked to Mr. Kaufman in there somewhere about getting the letter.

Q. All right. Did you finally get the letter on the night or the evening of the 25th?

A. Friday, yes.

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Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-759

WAYNE L. KIDWELL, Attorney General of Idaho, and TOM D. McELDOWNEY, Director of the Department of Finance of the State of Idaho,

Appellants,

v.

GREAT WESTERN UNITED CORPORATION,

Appellee.

On Appeal From the United States Court of Appeals for the Fifth Circuit

MOTION TO AFFIRM

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Great Western United Corp. v. Kidwell, 577 F. 2d 1256 (5th Cir. 1978)	2
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Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934)	10, 28
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State ex rel Sperandio v. Clymer, 568 SW 2d 935 (Mo. 1978)	13
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Texts and Treatises

1 J. Moore, Federal Practice ¶0.142[5.–2] 16

15 C. Wright et al., Federal Practice and Procedure: Jurisdiction §3806 16

Cohen, A Note on Takeover Bids and Corporate Purchases of Stock 22 THE BUSINESS LAWYER, 149 20

E. Aranow et al., DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL (1977) 29

Langevoort, State Tender Offer Legislation: Interests, Effects and Political Competency, 62 CORNELL L. REV. 213 (1977) 18

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In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. _____

WAYNE L. KIDWELL, Attorney General of Idaho, and TOM D. McELDOWNEY, Director of the Department of Finance of the State of Idaho,

Appellants,

v.

GREAT WESTERN UNITED CORPORATION,

Appellee.

On Appeal From the United States Court of Appeals for the Fifth Circuit

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MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment and decree of the United States Court of Appeals for the Fifth Circuit be affirmed on the ground that the issues were

correctly resolved and do not warrant further argument or review.

QUESTIONS PRESENTED

1. Can a United States District Court sitting in Texas obtain personal jurisdiction of an Idaho official who has attempted to enforce, extraterritorially, a state statute which intentionally affects Texas residents in Texas?

2. Is venue proper in a United States District Court in Texas for a suit against an Idaho official who is alleged to have enforced an unconstitutional statute in violation of the Securities and Exchange Act of 1934?

3. Is the Idaho Corporate Takeover Statute (Idaho Code §§30-1501, et seq.) unconstitutional because it regulates activity in a field preempted by the federal Williams Act?

4. Does the Idaho Corporate Takeover Statute effect an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the U.S. Constitution?

STATEMENT

This is an appeal from the final judgment and decree entered on August 10, 1978 by the United States Court of Appeals for the Fifth Circuit (577 F. 2d 1256) affirming the judgment entered on September 6, 1977 by the United States District Court for the Northern District of Texas, Dallas Division (439 F. Supp. 420).

The District Court found it had personal jurisdiction of the Idaho defendants and venue was proper in the Northern District of Texas. That court entered judgment declaring unconstitutional and restraining the enforcement

of the Idaho Corporate Takeover Statute[1] ("Idaho Takeover Statute") insofar as it purported to apply to a proposed interstate cash tender offer by Great Western United Corporation ("GWU") for the purchase of securities of Sunshine Mining Company ("Sunshine").

I. PROPOSED TENDER OFFER

On March 21, 1977, GWU announced its intention to make a tender offer to purchase up to two million shares of Sunshine, subject to the terms and conditions set forth in a proposed form of an Offer to Purchase and related Letter of Transmittal filed by GWU with the Securities and Exchange Commission pursuant to 15 U.S.C. §§78m(d)-(e) (the "Williams Act"). The Honorable Marion Callister, United States District Judge for the District of Idaho, held in the course of litigation related to the present case that GWU was in compliance with the requirements of the Williams Act, which regulates interstate tender offers.[2]

II. ADMINISTRATIVE PROCEEDINGS

On March 21, 1977, GWU filed various documents with the Commissioner of Finance of the State of Idaho in compliance with the Idaho Takeover Statute. On March 25, 1977, Appellant McEldowney, with no notice to GWU, without hearing, and without posting bond or other security, issued an

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[1] Idaho Code §§30-1501, *et. seq.*

[2] *Sunshine Mining Co. v. Great Western United Corp.* (1977-1978 Transfer Binder) Fed. Sec. L. Rep. (CCH) §96049. In that related case brought against GWU by Sunshine in an attempt to block the proposed tender offer, the District Court in Idaho denied injunctive relief and specifically found that there were no material omissions in GWU's filings with the SEC. That litigation was dismissed as a result of settlement between the parties on October 5, 1977.

order that effectively enjoined GWU's proposed interstate cash tender offer for more than five months.

During this incipient stage of the proposed tender offer by GWU for shares of Sunshine, it was indicated that the States of Maryland and New York,[3] in addition to the State of Idaho, would assert jurisdiction over the proposed offer. Representatives of GWU sought definitive directions from officials of those two states, but were left uncertain as to whether compliance would be required. Because of this uncertainty and the inconsistencies between the various state acts, when this suit was instituted, Maryland and New York officials were joined as party defendants. For reasons detailed later, the only parties defendant remaining in the case after final judgment by the District Court were Wayne L. Kidwell, Attorney General of Idaho, who chose not to appeal from Judge Hill's Judgment, and Tom D. McEldowney, Director of the Idaho Department of Finance, the Appellant herein.

Because Kidwell was not a party to the appellate proceedings below, GWU has moved this Court to dismiss him as a party to the proceedings before this Court.

III. PROCEEDINGS AND OPINION BELOW

On March 28, 1977, GWU filed its Complaint against the representatives of the States of Maryland, New York and Idaho (including Appellants) who are charged with the responsibility of enforcing the state takeover statutes of those States. The action was commenced in the United States District Court for the Northern District of

[3] Sunshine's wholly owned subsidiary, Anchor Post Products, Inc. has manufacturing facilities based in Maryland and Sunshine conducts business in New York. Therefore, the takeover statutes of those states were arguably applicable to GWU's offer.

Texas. The Complaint alleged, in substance, that GWU was aggrieved by acts and threatened acts of the Appellants and the other Defendants directed against GWU and that such acts were unconstitutional. GWU sought a declaratory judgment that the state takeover statutes, insofar as they purport to apply to an interstate cash tender offer for the purchase of securities traded on a national securities market (a) represented an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, (b) intruded without warrant into an area preempted by federal regulation in contravention of the Supremacy Clause of the United States Constitution and (c) denied rights of equal protection of the law and due process of the law guaranteed by the Fourteenth Amendment to the United States Constitution and the Civil Rights Act.

On March 30, 1977, counsel for Appellants and the other Defendants appeared specially and moved to dismiss the action as to them by challenge to jurisdiction and venue. At the hearing, argument was heard on the issues of jurisdiction and venue, as well as on issues going to the merits of GWU's Application for a Preliminary Injunction. The District Court took judicial notice of the Williams Act and of the state takeover statutes. Counsel for Appellant McEldowney advised the District Court o nthe record that he was seeking to apply the provisions of the Idaho Act extraterritorially, so as to prohibit GWU's proposed tender offer from going forward in any State until and unless the requirements of the Idaho Takeover Statute were satisfied.

Following the hearing, the District Court entered a Temporary Restraining Order finding that immediate and irreparable injury, loss or damage would result to GWU unless Defendants were forthwith restrained as prayed in the Com-

plaint. The court found that GWU would be deprived of its right under the federal law to make its proposed cash tender offer, would be subjected to conflicting laws, would be subjected to delays which disrupt the orderly trading of its securities and those of Sunshine on national securities markets, and might be denied the advantages of the uniform national system of regulation in making its interstate cash tender offer.

Appellants thereupon filed a Notice of Appeal with the United States Court of Appeals for the Fifth Circuit and moved for a stay of the Temporary Restraining Order and for expedited appeal. Following a hearing on April 5, 1977, the Circuit Court issued an Order staying the Order of the District Court pending further proceedings in the District Court, directing the District Court to consider the issues of jurisdiction and venue and enter Findings of Fact and Conclusion of Law thereon before consideration of the merits, and directing the District Court, should it determine that it had jurisdiction and venue, to consider certification of the determination under 28 U.S.C. §1292 (b) before trial on the merits.

The District Court on April 8, 1977, held a full evidentiary hearing on the issues of jurisdiction and venue. On April 21, 1977, the District Court filed its Findings of Fact and Conclusions of Law, finding that no case or controversy existed with respect to Maryland, but finding that a case or controversy did exist with respect to both the New York and Idaho Defendants, and further finding that jurisdiction and venue over the New York and Idaho Defendants were proper in the Northern District of Texas. The Maryland defendant was dismissed from the case. The Trial Court denied an interlocutory appeal and declined certification for the reasons given in its Order. The court postponed

the hearing on the merits until May 6, 1977, because of the Defendants' expressed intention to attempt to mandamus an interlocutory appeal. The Fifth Circuit ultimately denied the interlocutory appeal and the request by Defendants for a writ of mandamus.

On May 23 and May 24, 1977, a hearing on the merits of the constitutionality of the state takeover statutes was held before Judge Hill. At the opening of that hearing, the New York officials advised the court and GWU that New York had decided not to assert jurisdiction over the tender offer. Although the attorneys for the New York defendant participated in the hearing, the court ultimately determined that GWU's case against New York was moot.

On September 6, 1977, the District Court entered Judgment declaring unconstitutional and restraining the enforcement of the Idaho Takeover Statute insofar as it purported to apply to GWU's proposed cash tender offer for the purchase of the securities of Sunshine. Specifically, the court found that as applied in the instant case the Idaho Takeover Statute represented an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the federal Constitution and intruded without justification into an area preempted by federal securities laws in violation of the Supremacy Clause. The Judgment was stayed by the District Court through September 16, 1977, to enable the Defendants to file an application for a stay of the Judgment with the Circuit Court and to enable that court to consider whether to grant a further stay of the Judgment pending a ruling on the Defendants' application. On September 16, 1977, the Fifth Circuit entered its Order denying a stay of the trial court's judgment.

On August 10, 1978, the Fifth Circuit entered its decision affirming the judgment of the trial court. Specificially, the

Fifth Circuit held (a) the district court had subject matter jurisdiction of the controversy, (b) the district court had personal jurisdiction of the defendants by application of the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), (c) the Texas long arm statute[4] constitutionally authorized assertion of personal jurisdiction over the nonresident defendants, (d) section 27 of the Securities Exchange Act of 1934 provided an independent source of personal jurisdiction over the defendant Idaho officials, (e) venue in the Northern District of Texas was proper under both §27 of the Securities and Exchange Act of 1934 and 28 U.S.C. §1391(b), the applicable general venue statute, (f) the Idaho Takeover Statute is preempted by federal securities laws and (g) the Idaho Takeover Statute is invalid under the commerce clause, U.S. CONST. art. I §8.

The resolution of the issues by the Fifth Circuit Court of Appeals conformed to constitutional standards and to the applicable pronouncements of this Court. The decision of that court is correct and no further argument or review is warranted.

ARGUMENT

The courts below applied traditional principles of personal jurisdiction in a unique, but not difficult, setting. Unlike any other state statutes, state takeover acts, of which the Idaho act is typical, *intentionally* affect and even prohibit commerce not only among, but within other states.[5]

[4] TEX. REX. CIV. STAT. ANN. art. 2031b (Vernon).

[5] Counsel for Director McEldowney advised the District Court on the record that he was seeking to apply the provisions of the Idaho Act extraterritorially, so as to prohibit GWU's proposed tender offer from going forward in any State until and unless the requirements of the Idaho Act were satisfied.

The Sunshine stock which GWU was attempting to acquire in the course of its proposed case tender offer was widely held and regularly traded on national securities markets.[6] However, had the Idaho Statute not been declared unconstitutional and unenforceable by the District Court, GWU could have made its offer *nowhere* in the world until it had complied with the Idaho Takeover Statute. The commencement of GWU's tender offer was delayed for 5 months after the Idaho Department of Finance determined to take jurisdiction of GWU's proposed cash tender offer. GWU's offer was made to Sunshine shareholders only after entry of the District Court's judgment that Idaho's Takeover Statute is unconstitutional and unenforceable and subsequent to the Circuit Court's order of September 16, 1977, refusing to stay that judgment pending appeal.[7] By his application of the Idaho Act, Appellant McEldowney, for a substantial period of time, denied the right of residents of states other than Idaho, including Texas, to determine whether they wished to accept GWU's cash offer. McEldowney, while asserting this extraordinary power over the commerce of other states would deny to courts sitting in those other states the right to pass on the legality of the exercise of such extraterritorial regulation.

Under the teachings of this Court, Idaho may not refuse to recognize the territorial limits of its legislative

[6] Sunshine stock is traded on the New York and Spokane Stock Exchanges.

[7] It should be brought to the Court's attention that the tender offer expired October 5, 1977. The shares of Sunshine acquired through the offer were transferred to Western Investment Company ("Western"), a GWU subsidiary, on April 20, 1978. On October 4, 1977 GWU, Sunshine and Hunt International Resources Corporation ("HIRCO") entered an agreement whereby GWU and HIRCO would propose some form of reorganization with Sunshine. Discussions, as well as litigation relative to this reorganization are currently taking place.

authority. Legislative enactments can have binding effect only within the territorial confines of the jurisdiction passing the law *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 202 U.S. 143 (1934); *Hilton v. Guyot*, 159 U.S. 113 (1894).

The courts below were not asked to determine the manner in which the State of Idaho may permissibly govern its internal affairs. Those courts were called upon only to determine whether the Idaho statute could be applied to govern and halt commerce within the State of Texas and throughout the nation.[8] The courts below correctly held it could not, particularly where GWU is neither incorporated nor licensed to do business in Idaho, Sunshine is not incorporated in Idaho, and the Idaho statute does not require the presence in Idaho of any Sunshine shareholder.

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[8] Judge Wisdom stated in his opinion for the Fifth Circuit in this case:

> Idaho Code §30-1530(1) states, in part that "It is unlawful for any person to make a take-over involving a target company in this state or to acquire any equity securities of a target company pursuant to the offer, unless the offer is effective under this chapter or is exempted by rule or order of the director". As interpreted by the Idaho Department of Finance, this provision would prevent Great Western from making a tender offer to anyone in the world if it did not comply with the Idaho statute.

577 F. 2d at 1263. Similarly, the district judge concluded that:

> Officials of Idaho . . . give extraterritorial effect to their takeover statute[] by forbidding tender offerors under their jurisdiction from making any offer to residents of another state which is not made to residents of Idaho. . . . Idaho Code §30-1506. . . . .

Judge Hill's Findings of Facts and Conclusions of Law filed April 21, 1977 at 6. Section 30-1506 provides in pertinent part:

> LIMITATIONS ON OFFERORS. — (1) No offeror may make a takeover offer involving a target company which is not made to all its stockholders in this state, or which is not made to stockholders outside this state.

THE DOCTRINE OF EX PARTE YOUNG WAS PROPERLY APPLIED BY THE COURTS BELOW

This Court established in *Ex Parte Young*, 209 U.S. 123 (1908) that a suit by an aggrieved person to restrain a state official from enforcing an allegedly unconstitutional state statute is a suit against the state official in his individual capacity and is therefore not barred by the Eleventh Amendment. As noted by the Fifth Circuit in this case, this Court has recently refused to overrule or restrict that decision. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 156-157 n. 6 (1978). It has consistently been reaffirmed over the seventy years of *Ex Parte Young's* existence that the Eleventh Amendment does not prohibit claims for declaratory and prospective injunctive relief against state officials who seek to enforce unconstitutional state statutes. *See e.g., Edelman v. Jordan*, 415 U.S. 651 (1974). GWU in its suit against Appellants sought nothing other than declaratory and injunctive relief against the prospective enforcement against it of the Idaho Takeover Statute.

McEldowney's argument that *Ex Parte Young* permits a state official to be sued only in federal courts located in the state where the official holds office[9] is without support and was seriously undercut by the concurring opinions of four members of this Court in *California v. Texas*, ... U.S. ....., 98 S. Ct. 3107 (1978). The necessary import of those opinions, suggesting the availability of a federal interpleader action where an estate is potentially subject to the taxing authority of more than one state, is that a federal forum exists wherein personal jurisdiction of the taxing officials of both Texas and California is proper. The officials of at least one state must defend the action in a federal district

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[9] Appellant's Jurisdictional Statement at 12-13.

court outside the state in which they hold office. The *power* to compel a state official to defend a suit against him outside his home state exists. The Fifth Circuit applied the doctrine of *Ex Parte Young* as its progeny dictates, accurately concluding that:

> We read *Young* to say that a state official enforcing an unconstitutional statute is an individual defendant and nothing more. Under the reasoning of *Ex Parte Young*, the state has no interest in the lawsuit, for it is incapable of authorizing an unconstitutional act.[10]

Thus, the remaining and conventional inquiry is whether the non-resident official has sufficient contacts with the forum to support its assertion of personal jurisdiction.

As the Fifth Circuit explained, the propriety of personal jurisdiction in Texas in this suit was a function of Idaho's regulatory activities, not a failure by the trial court to properly understand and apply the teachings of *Ex Parte Young*.

> The dearth of previous cases where a state official has been sued outside his home state is probably attributable to the states having rarely, if ever, enacted statutes similar to the Idaho takeover law (and most other state takeover laws) that purport to extend a local official's regulatory jurisdiction to other states.

577 F. 2d at 1266.

PERSONAL JURISDICTION AND VENUE WERE PROPER UNDER THE TEXAS LONG ARM STATUTE

The Texas Long Arm Statute authorizes the assertion of personal jurisdiction over non-residents to the limits of due process. *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.

[10] 577 F. 2d at 1265.

2d 760 (Tex. 1977). Thus, the Fifth Circuit properly perceived the issue presented to it:

> The question is whether due process permits a court in Texas to exercise jurisdiction over the Idaho official who has enforced the Idaho takeover law to prevent a Texas-based corporation from proceeding with a national tender offer.

577 F. 2d at 1266.

Lower federal courts and state courts have uniformly considered it possible to satisfy the "minimum contacts" requirement of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) by showing that a defendant engaged in activity outside the forum state which caused reasonably foreseeable consequences within the state. See, e.g., *State ex rel Sperandio v. Clymer*, 568 S.W. 2d 935 (Mo. 1978); *Black v. Acme Markets, Inc.*, 564 F. 2d 681 (5th Cir. 1977); and cases cited in the Fifth Circuit's opinion, 577 F. 2d at 1266. Director McEldowney's assertion that this Court has rejected such an "effects" test is not supported by *Kulko v. Superior Court*, 436 U.S. 84, (1978). In the words of Judge Wisdom:

> *Kulko* does not hold that a court considering an *International Shoe* question may not look to effects within the forum unless the defendant's effect-producing activity causes physical injury within the forum state or affects the defendant's commercial transactions within the forum state. Justice Marshall discussed these factors to support his conclusion that the effect in *Kulko* could not support personal jurisdiction in California. He did not establish new general restrictions on the use of the effects test in the application of *International Shoe*.

577 F. 2d at 1267.

The various aspects of the minimum contacts test (i.e., whether the defendant is "doing business" in the forum,

whether he has undertaken "purposeful activity" in the forum and whether he has purposefully availed himself of the benefits and protections of the forum's laws) are merely aids in determining whether contacts with the forum are sufficient to support a constitutional assertion of personal jurisdiction. Thus, the trial court concluded that "'[d]oing business' under [the Texas long arm statute] includes all acts or omissions which subject the defendant to the exercise of jurisdiction by Texas courts; the terminology has no commercial import." District Court's Findings and Conclusions at 6. Both courts below, after examining what was essentially a fact question, held that the test for obtaining personal juridiction of a non-resident defendant as announced by this Court was met. "The activities of the defendant officials were to regulate tender offers. The impact of their regulation was felt in Texas, as they intended it to be. Thus, they did conduct activities in Texas."[12] 577 F. 2d at 1269.

Personal jurisdiction over Director McEldowney was also proper under section 27 of the Securities and Exchange Act

[12] Discussing the effects within Texas of the Appellants' actions, the Circuit Court noted:

> When the Idaho officials, through the Idaho Takeover Statute, asserted jurisdiction over the Great Western offer for Sunshine, they foreseeably caused efforts in Texas to comply with the Idaho state law. When the Idaho officials summarily delayed the effectiveness of Great Western's tender offer for Sunshine, they foreseeably restrained a corporation in Dallas from proceeding with its plans. In other words, the Idaho officials regulated a corporation that acts in the Northern District of Texas and through that regulation foreseeably changed the corporation's actions. These effects — effects with substantial consequences on important business plans — are more than sufficient to satisfy the minimum contacts requirement.

577 F. 2d at 1267.

of 1934.[13] Section 28 of that Act, as the Court of Appeals determined, ". . . essentially restates the supremacy cause, making it a statutory as well as a constitutional requirement." 577 F. 2d at 1271. Section 28 thus imposes upon the states a duty not to enact or enforce laws that conflict with the Securities and Exchange Act. As the courts below held, breach of this duty subjects state officials to the jurisdiction and venue provisions of §27.

Venue, as well as personal jurisdiction was supported by §27. The Court of Appeals concluded:

> Venue is proper in any district where acts constituting part of the alleged violation of the 1934 Act occurred. The alleged violation consists of enforcing an invalid statute. The regulatory activities by the Idaho officials had their restraining effect at the corporate headquarters of Great Western in Dallas. This was a sufficient act to make venue proper in the Northern District of Texas.

577 F. 2d at 1272.

Venue in the Northern District of Texas was also proper under the applicable general venue statute, 28 U.S.C. §1391

[13] 15 U.S.C. §78aa (1970). That section provides in pertinent part:

> Any criminal proceeding [under the Act] may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

(b).[15] Acknowledging that this statute can be read to provide venue in only one district, Judge Wisdom observed "Commentators have recognized. . . that a preferable approach would be to equate the availability of compulsory process on a non-resident and proper venue under §1391."[16] However, whether a narrow or expansive reading of §1391 is followed venue was proper for "If there is a single place where the allegedly invalid restraint occurred, that place is Dallas." 577 F. 2d at 1273.

The propriety of venue in the Northern District of Texas is underscored by the posture of this case as originally brought. Officials of New York and Maryland, as well as Idaho, indicated they would assert juridiction over GWU's offer.[17] Had all three states asserted jurisdiction there would have been no district in which all defendants resided. Only in the Northern District of Texas, the focal point of the regulatory activity, could the entire controversy be tried in a single suit.[18]

Appellant protests that the resolution of the personal jurisdiction and venue issues by the courts below will subject state officials to a multitude of suits in federal courts in distant states. This overlooks the unique nature of the statute he seeks to enforce. It is only when officials of one state purport to govern affairs in another state that they may be subjected to the jurisdiction of the courts of that other

[15] That statute provides:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

[16] 577 F. 2d at 1273. 1 J. MOORE, FEDERAL PRACTICE ¶0.142 [5.-2] at 1430 and 15 C. WRIGHT et al., FEDERAL PRACTICE & PROCEDURE: JURISDICTION §3806 at 29.

[17] See, *supra* at 4.

[18] See, 577 F. 2d at 1273-1274.

state. The real threat to principles of federalism presented by this case is not the effect on state officials of the assertion of personal jurisdiction. Rather, the threat is to the soverignty of all states if jurisdiction is denied in a case such as this where a state purports to supplant the authority of Congress and attempts to legislate for the entire nation.[19]

THE PREEMPTION ISSUE WAS CORRECTLY DECIDED

When congressional legislation conflicts, either expressly or implicitly, with state legislation, the latter is inoperative. *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 156 (1942). The preemption doctrine dictates that state legislation is an unconstitutional infringement on federal supremacy if: (1) Congress intended to displace state regulation or "the scheme of the federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); (2) the subject affected necessitates a uniform system of regulation, *California v. Zook*, 336 U.S. 725, 728 (1949); or (3) the state staute conflicts with the federal regulatory scheme. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 231-36 (1947).

A state statute "conflicts" with the federal law when it frustrates the realization of the goals Congress sought to achieve. The state statute need not make compliance with applicable federal law impossible. This Court has recently stated:

> Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found "where compliance with both federal and state regulations is a physical im-

[19] See, 577 F. 2d at 1269-70.

> possibility. . .," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 10 L Ed 2d 248, 83 S Ct 1210 (1963), or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress", *Hines v. Davidowitz*, 312 U.S. 52, 67, 85 L Ed 581, 61 S Ct 399 (1941); *Jones v. Rath Packing Co.*, [430 U.S.] at 526, 540-541, 51 L Ed 2d 604, 97 S Ct 1305. Accord, *De Canas v. Bica*, 424 U.S. 351, 363, 47 L Ed 2d 43, 96 S Ct 933 (1976).

Ray v. Atlantic Richfield Co., 435 U.S. at 158 (1978). Applying this test the Court of Appeals properly held in this case that ". . . the particular takeover law before us cannot stand because it conflicts with the federal statute. In the words of *Hines*, 'it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 577 F. 2d at 1275.[20]

It is unnecessary in demonstrating that a state statute has been preempted to find a specific congressional expression of preemption or even to find that a particular state requirement is totally inconsistent with federal law. *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). "Conflict" should be construed in its "broadest sense" where, as in this case, there is "conflict with a complex and interrelated federal scheme of law, remedy, and administration." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959).

This Court has held that Congress, recognizing that tender offers serve important economic functions, adopted a policy of absolute "evenhandedness" dictating that neither the

[20] Commentators have also concluded that state takeover statutes are invalid under the Supremacy Clause. See *e.g., Langevoort, State Tender Offer Legislation: Interests, Effects and Political Competency*, 62 CORNELL L. REV. 213 (1977); Note, *State Takeover Statutes Versus Congressional Intent: Preempting the Maze*, 5 HOFSTRA L. REV. 857 (1977).

target company nor the offeror would be favored. "Congress was indeed committed to a policy of neutrality in contests for [corporate] control. . ." *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 29 (1977). The beneficiaries of the Williams Act were the shareholders who could best be served by a policy of strict neutrality which gave advantage to neither the incumbent management of the target company nor the offeror. *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58-59 (1975).

The Williams Act reflects a congressional policy to regulate, not eliminate, tender offers.[21] The evenhanded regulation which is the hallmark of the Williams Act is destroyed by the Idaho Takeover Statute in multiple ways, including: (1) advance notification and prefiling requirements imposed by the Idaho Takeover Statute delay the commencement of an offer to the benefit of the target company; (2) the Idaho Act gives the target company the ability to delay further the commencement of an offer by insisting on a hearing; (3) Idaho's regulation of defensive efforts by a target is significantly weaker than Idaho's regulation of the offeror's activities, and (4) the Idaho statute gives the target company board the power to exclude an offer from state regulation by approving the offer. 577 F. 2d at 1278.

Delay in the commencement of a tender offer destroys the balance struck by Congress and gives incumbent management ample time to take action to defeat a tender offer.

> Congress recognized that delay can seriously impede a tender offer. . . It rejected legal requirements, such as

[21] H. R. Rep. No. 1171, 90th Cong., 2d Sess. 4 (1968); see *e.g. Hearings on S. 510 before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 114-19, 136-139, 165-75.*

> pre-commencement review by the SEC, that could delay offers unnecessarily. Such delay could prevent the offeror from fairly presenting its case.

577 F. 2d at 1277. While there is no specific waiting period required by the Idaho Act, an offer may not commence until approved by a state official and the target company may also delay the commencement of an offer by requesting a hearing which must be granted. Idaho Code §§30-1503(2), (4) and (5). During the waiting period, while the offer hangs in limbo, incumbent management is free to recommend a competing tender offer or seek a defensive merger.

The waiting periods imposed by the provisions of the Idaho statute stand in sharp contrast to the provisions of the Williams Act which require no waiting period for the commencement of a lawful offer. In fact, Congress considered and rejected various prefiling clearance provisions. Prior to the adoption of the Williams Act, a bill had been introduced in 1965[22] which would have required an offeror to give twenty days' advance notice to the target corporation and the SEC of its intent to make a tender offer. That bill never got out of committee. The SEC opposed the bill because, as then-SEC chairman Manuel F. Cohen said, "we believe this might give management an unwarranted advantage when the offer is opposed." Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock*, 22 THE BUSINESS LAWYER, 149, 153. The SEC suggested a seven day waiting period, but that was likewise rejected by Congress. *Id.*

If additional evidence of Congressional intent is required, it is found in the legislative history of the recently passed Hart-Scott-Rodino Antitrust Improvements Act of 1976. That enactment, designed to provide for administrative review of the antitrust implications of certain corporate amal-

[22] S. 2731, 89th Cong., 1st Sess. (1965)

gamations necessitated Congress' reexamination of its attitude toward tender offers as expressed in the Williams Act. While Congress provided for a thirty (30) day waiting period prior to the consummation of any mergers, it enacted only a fifteen (15) day waiting period (and that following the actual making of the offer) in the case of cash tender offers.[23]

Congress may soon have the opportunity to address conclusively the issue of federal preemption of state takeover statutes. A proposed Federal Securities Code, approved by the American Law Institute in May 1978, is to be introduced in Congress next year. Section 1904(c) of the Proposed Official Draft of the Code would specifically preempt state takeover acts except where the target company has its principal place of business in the regulating state and more than 50 percent of the target company shareholders holding more than 50 percent of the outstanding voting securities reside there.

Where Congress expressly rejects a specific form of regulation, such rejection is as sufficient to preempt a state statute that adopts the course rejected as is affirmative enactment of federal legislation that conflicts with the state legislation. *New York Central R.R. Co. v. Winfield*, 244 U.S. 147 (1917). Assuming the purpose of the Idaho Act was to protect investors and not to provide incumbent management with an arsenal of weapons to defeat tender offers, the entire approach to investor protection taken by Idaho is in conflict with that adopted by Congress in the Williams Act. Under the Williams Act the investor is fully informed and *he* chooses whether to accept an offer. Under the Idaho Act the choice is, in large part, made for him by incumbent manage-

[23] *See*, H. R. Rep. No. 94-1373, 94th Cong., 2nd Sess., at 12 (1976). And see the Court of Appeals decision at 577 F. 2d 1277-1278.

ment. Judge Wisdom explained the fundamental incompatibility of these approaches:

> Essentially, Congress relied upon a "market approach" to investor protection. The function of federal regulation is to get information to the investor by allowing both the offeror and the incumbent managers of a target company to present fully their arguments and then to let the investor decide for himself.
>
> * * *
>
> We need not probe the minds of Idaho legislators to determine whether the true purpose of the Idaho takeover law was to protect investors or to protect incumbent management. Even if we accept the appellant's interpretation of the legislature's purpose, it is still true that Idaho chose to protect investors differently from the way Congress protected investors. Instead of relying upon *investors'* decisions after full disclosure, Idaho relies upon the business judgment of corporate directors with a fiduciary duty to their shareholders. Idaho's "fiduciary approach" to investor protection may be one way to protect shareholders, but it is an approach Congress rejected.
>
> Idaho's statute is preempted, because the market approach to investor protection adopted by Congress and the fiduciary approach adopted by Idaho are incompatible.
>
> * * *
>
> Congress intended for the investor to evaluate a tender offer; Idaho asks the target company management to make that decision on behalf of the shareholders.

577 F. 2d at 1276, 1279.

Congressional rejection of advance notification and prefiling requirements was part of a cohesive and well-balanced regulatory scheme to assure maximum benefits to shareholders and minimum disruption of market transactions. By avoiding advance notice and delay provisions, which the Idaho Takeover Statute adopted, Congress sought to preserve the tender offer as a means of effectuating a change in corporate control. Note, *Commerce Clause Limitations Upon State Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133, 1146 (1974).

The Idaho Takeover Statute requires of an offeror substantially more disclosure than the Williams Act. These burdensome disclosure requirements do not supplement the protection afforded investors by the Williams Act. They interfere with the federal regulatory scheme.

The disclosure mandated by the Idaho Act is similar to that included in a Form S-1 Registration Statement required by the Securities Act of 1933. *See* Idaho Code §30-1502(2). The results are that management of the target company can delay an offer by challenging the sufficiency of the offeror's disclosures and investors are buried beneath an avalanche of confusing and irrelevant information.[24] The Williams Act, on the other hand, requires disclosure of only that information Congress and the SEC deemed necessary and relevant.[25]

---

[24] As Judge Wisdom summarized the effects of the disclosure requirements of the Idaho Act:

> Superficially Idaho's extensive disclosure requirements appear compatible with a market approach to tender offer investor protection. In reality, in the area of financial disclosure it can be true that "less is more". Disclosure of a mass of irrelevant data can confuse the investor and obscure relevant disclosures. . . . Management may also be able to halt an offer because some immaterial information required by excessive disclosure standards is missing or inaccurate. . . . Those excessive requirements would cut off an offeror's opportunity to present the material information that investors need to make their decisions.

577 F. 2d at 1280.

[25] *See, Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong.* 1st Sess. at 205. (Comments of Manuel F. Cohen, then chairman of the SEC).

Not only did Congress thoroughly investigate the matter of disclosure, but the SEC has recently reconsidered the amount of disclosure which should be required by an offeror. The Commission adopted, effective Augut 31, 1977, a new Tender Offer Statement on Schedule 14 D-1 and has also adopted the amendments of existing Rule 14 D-1 and the Acquisition Statement on Schedule 13D. The effect of these actions is to require the disclosure of certain information regarding the offeror's source of funds, its plans or proposals and past negotiations or transactions with the subject company. The new schedule would require the disclosure of certain financial information and pending legal proceedings relating to the tender offer if such information is material to an investment decision by a security holder. This action represents a studied attempt to provide *meaningful* disclosure to shareholders and preserve the congressional policy of evenhandedness.

Unlike the Williams Act, the Idaho statute requires excessive information which gives target company management too strong a weapon to block offers. Contrary to congressional policy, these additional requirements tip the balance of regulation in favor of incumbent management and serve no purpose except delay and obstruction. The disclosure of this additional information can hardly be essential because none of it need be disclosed to shareholders when the management of the target company approves the offer. As the Fifth Circuit concluded in this case:

> . . . Idaho's additions to the federal disclosure requirements reduce the utility of federally required disclosure and produce an obstacle to the accomplishment of the federal objective to enable investors to make an informed choice about a tender offer.

577 F. 2d at 1281.

Federal law preempts a state statute whenever a scheme of regulation, created by federal legislation and implemented by a federal administrative agency charged with responsibility for enforcing the regulatory scheme, is so pervasive that no room has been left for state law to provide supplemental regulation. *Ray v. Atlantic Richfield Co., supra; Rice v. Santa Fe Elevator Corp., supra.*

Where the federal government has reached a balance which satisfies the "needs of the subject matter without disproportionate burden on the regulatees, the balance struck is not to be upset by the imposition of higher local standards." *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 171 (1963) (White, J. Dissenting). Thus, the Supremacy Clause forbade efforts by a state to afford patent protection to that which Congress had deemed unworthy of protection because the state efforts "disturbed the careful balance" which Congress had drawn. *Goldstein v. California*, 412 U.S. 546, 569-70 (1973).

The Williams Act provides the offeror and incumbent management of the target company with equal opportunity to present their cases to the shareholders, who will then be able to make a fully informed choice. The Idaho statute disturbs this careful balance. This Court has declared that "just as a state cannot encroach upon the federal . . . law directly, it cannot give protection of a kind that clashes with the objectives of the federal law." *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964). In view of the pervasive federal regulation of interstate cash tender offers, congressional action has preempted any state regulation of the field.

Whenever federal law regulates a field in which the federal interest is dominant, the federal system necessarily pre-

cludes enforcement of state laws on the same subject. *Ray v. Atlantic Richfield Co., supra; Hines v. Davidowitz,* 312 U.S. 52 (1941). The necessity of a unform system of regulation of a subject implies a congressional intent to preempt state regulation in that field. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973); *California v. Zook*, 336 U.S. 725 (1949).

Interstate tender offers require a uniform system of national regulation because non-uniform, arbitrary protection of incumbent management precludes effective functioning of the national securities markets. *Hearings on Corporate Takeovers Before the Senate Comm. on Banking, Housing and Urban Affairs*, 49th Cong., 2d Sess. 101 (1976) (statement by Richard A. Debs, Federal Reserve Bank, New York.). "[T]ender offers are frequently a matter of national concern and the issues they present call for resolution on a national scale". *Id.* at 91 (comment of SEC Commissioner Phillip Loomis).

Thirty-two states currently have takeover statutes. This proliferation has increased the probability of inconsistent requirements among the state statutes. It has also increased the liklihood that more than one state will assert jurisdiction over an interstate offer. Regardless of which states ultimately decide to take jurisdiction, offerors will be faced with the possibility of hearings in more than one state and the potential of inconsistent determinations regarding the legality of their offers. This problem was presented in this case when state officials of Idaho, New York and Maryland threatened, considered or actually asserted purisdiction over GWU's offer.

The inability of the Idaho Legislature to effectively regulate tender offers without causing nationwide repercussions

demonstrates the necessity of a single, uniform federal scheme of regulation.

THE INTERSTATE COMMERCE ISSUE WAS CORRECTLY DECIDED

Both courts below held that the Idaho Takeover Statute impermissibly burdens interstate commerce. To reach this determination each court accurately applied the test enunicated by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), a case Judge Wisdom referred to as "a restatement and distillation" of cases construing the commerce clause.[26]

As previously illustrated,[27] the Idaho statute effectively protects incumbent management of the target company. The act is designed to protect local industry in a way forbidden by *Pike*. As the Court of Appeals noted, if the purpose of the act is to prevent the removal of local business to other

---

[26] Writing for a unanimous Court in *Pike*, Justice Stewart declared:

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . if a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

397 U.S. at 142.

[27] *Supra* at 19 et. seq.

states that purpose is insufficient to protect the statute from a commerce clause attack.[28]

It is also difficult to accept that the Idaho law represents an effort to protect local shareholders because its provisions apply even to offers where no shareholder resides in Idaho. The effects of the Idaho legislation are to discourage the making and commencement of tender offers and disrupt national securities markets.[29]

A statute with extraterritorial impact, which can and did preclude the commencement of a tender offer in every part of the nation, places a great burden of delay and inconvenience on potential offerors. A state's regulation is also of doubtful validity under the Commerce Clause where it necessarily extends far beyond that state's boundaries, since:

> To the extent that the burden of state regulation falls on interests outside the state it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.

Southern Pacific Co. v. Arizona, 325 U.S. 761, 767-68 n2 (1945); *see also, Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1974).

Any local benefits derived from regulation of tender offers that take place outside of Idaho between nonresident investors do not justify the severe burdens upon interstate commerce imposed by the Idaho statute. That law denies an out-of-state offeror the right to purchase securities without

[28] 577 F. 2d at 1282; and see Note, *Commerce Clause Limitations Upon State Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133, 1159 (1974).

[29] *See*, 577 F. 2d at 1283 and authorities cited therein.

compliance with the Idaho statute even though the offer is made to shareholders not residing in Idaho. The state statute thus imposes an excessive burden on interstate commerce which is not justified by any legitimate local interest.

The Idaho statute, standing alone, impermissibly burdens interstate commerce. This burden is multiplied by the proliferation of state takeover statutes.[30]

> . . . the state tender offer statutes as a class significantly and unjustifiably interfere with a free flow of interstate commerce in order to benefit purely local interests, and are an unfortunate step backward in the orderly development of the federal securities laws.

E. Aranow et al., DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL (1977) at 233.

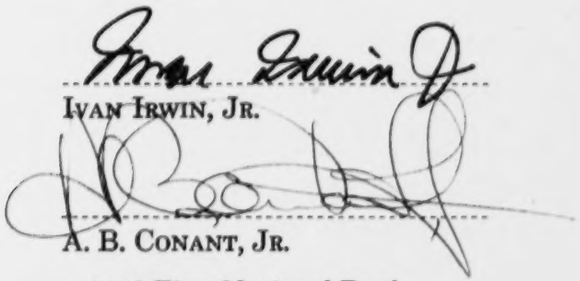
The benefits provided target company shareholders by the Idaho statute are, at best, uncertain. Yet that law can restrict interstate commerce regardless of the residence of these shareholders. As the Fifth Circuit, in agreement with the district court, concluded, "Idaho's extraterritorial regulation of tender offers interferes with securities transactions all over the country. In this case, Idaho's law halted over 31 million dollars of interstate commerce." 577 F. 2d at 1286. On balance, the ". . . burdens [on interstate commerce] are disproportionate to the legitimate benefits the Idaho takeover law provides." *Id.*

[30] *Supra* at 26.

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit should be summarily affirmed on the grounds that the resolution of the issues was eminently correct and the questions presented by this appeal do not warrant further argument or review.

Respectfully submitted,



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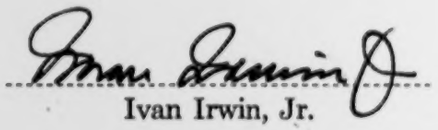

Ivan Irwin, Jr.

Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM 1978

No. 78-759

DAVID H. LEROY, Attorney General of Idaho,
and TOM D. McELDOWNEY,
Director of the Department of Finance
of the State of Idaho,
Appellants,

VS.

GREAT WESTERN UNITED CORPORATION,
Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

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Austin, Study Reveals Trends in Tactics, Premiums, Success Rates in Offers, N.Y.L.J., June 12, 1978 at 25 84

Baraf, The Foreign Corporation—A Problem in Choice of Law Doctrine, 33 Brooklyn L. Rev. 219 (1967) 112

Bickle, Judicial Determinations of Questions of Fact Affecting the Constitutional Validity of Legislative Action, 38 Harv. L. Rev. 6 (1924) 94

Biklé, The Silence of Congress, 41 Harv. L. Rev. 200 (1927) .. 85

Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 Yale L. J. 663 (1974) 87

Chatlos, The SEC v. investors on tender offers in Ideas for Action, Harv. Bus. Rev. 6 (Sept.-Oct. 1978) 98, 99

Fitzhugh, Tender Offer Issue Set for Court Showdown, N.Y.L.J., May 18, 1977 at 6 17

A. Fleischer, Tender Offers: Defenses, Responses, and Planning (1978) 100

Flom, Forcing a Friendly Offer, 32 Bus. Law. 1319 (1977) 15

Flom, The Role of the Takeover in the American Economy, 32 Bus. Law. 1299 (1977) 94

Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 198 (1967) (testimony of former SEC Chairman Cohen) 79

Hirsch, Toward a New View of Federal Preemption, 1972 U. Ill. L. F. 515 70

H.R. Rep. No. 85, 73d Cong., 1st Sess. (1933) 86

H.R. Rep. No. 1711, 90th Cong., 2d Sess. (1968) 111

R. Jennings & H. Marsh, Cases and Materials on Securities Regulation (4th ed. 1977) 112

Kaplan, Foreign Corporations and Local Corporate Policy, 21 Vand. L. Rev. 433 (1968) 112

Kurland, The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts, 25 U. Chi. L. Rev. 569 (1958) 43

Langevoort, State Tender Offer Legislation: Interests, Effects, and Political Competency, 62 Cornell L. Rev. 213 (1977) 68, 70, 108

Miscellaneous

Page

Latty, Powers & Breckenridge, The Proposed North Carolina Business Corporations Act, 33 N.C. L. Rev. 26 (1954) 112

Latty, Pseudo-Foreign Corporations, 65 Yale L. J. 137 (1955) 106, 112

Lipton, Open Market Purchases, 32 Bus. Law. 1321 (1977) .. 14, 18

1 M. Lipton & E. Steinberger, Takeovers and Freezeouts (1978) 16, 100

L. Loss & E. Cowett, Blue Sky (1958) 109

I L. Loss, Securities Regulation (2d ed. 1961) 84, 93

Martiniak, Hall v. Nevada: State Court Jurisdiction Over Sister States v. American-State Sovereign Immunity, 63 Cal. L. Rev. 1144 (1975) 36

F. McCaffrey, Statutory Construction (1953) 78

Nader, The Case for Federal Chartering in Corporate Power In America 67 (R. Nader & M. Green eds. 1973) 82

Note, Commerce Clause Limitations on State Regulation of Tender Offers, 47 S. Cal. L. Rev. 1133 (1974) 116

Note, Federal Chartering of Corporations: A Proposal, 61 Geo. L. J. 89 (1972) 87

Note, Securities Law and the Constitution: State Tender Offer Statutes Reconsidered, 88 Yale L. J. 510 (1979) .. 16, 70, 78, 79, 80

Note, The Constitutionality of State Takeover Statutes: A Response to Great Western, 53 N.Y.U. L. Rev. 872 (1978) 69, 82, 92, 97, 109, 120

Note, The Courts and the Williams Act: Try a Little Tenderness, 48 N.Y.U. L. Rev. 991 (1973) 94

Note, The Presumption Doctrine: Shifting Perspectives on Federalism and the Burger Court, 75 Colum. L. Rev. 623 (1975) 72, 73

Reese & Kaufman, The Law Governing Corporate Affairs: Choice of Law and the Scope of Full Faith and Credit, 58 Colum. L. Rev. 1118 (1958) 105

Restatement (Second) of the Conflict of Laws § 6(2) (1971) 112

Robinson, Directors Under Attack in New "Bear Hug" Mergers, N.Y.L.J., June 12, 1978 at 25 ..... 14, 15, 16, 94

Robinson, Tender Offers: Some Facts and Fancies, (Part 2), N.Y.L.J., May 18, 1976 at 1 69

Miscellaneous

Page

Securities and Exchange Comm'n Release Nos. 33-6022; 34-15548; IC-10575; File No. S7-770 dated Feb. 5, 1977 (17 C.F.R. Part 240) 14, 80, 81

SEC Investment Advisers Act Release No. 8 (Dec. 12, 1940) in CCH Fed. Sec. L. Rep. ¶¶ 56,420-21 ..... 57, 68

SEC Investment Advisers Act Release No. 40 (Feb. 5, 1945) in CCH Fed. Sec. L. Rep. ¶¶ 56,374-77 ..... 57, 68

Senate Comm. on Banking and Currency, Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids, S. Rep. No. 550, 90th Cong., 1st Sess. (1967) ... 69, 107, 108

Shipman, Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act, 21 Cas. W. Res. L. Rev. 722 (1970) 79, 85, 100, 106, 108, 110

Subcomm. on Proxy Solicitations and Tender Offers, Federal Regulation of Securities Comm., State Takeover Statutes and the Williams Act, 32 Bus. Law. 187 (1976) 69, 74, 125

The Federalist, No. 32 (New American Lib. ed. 1961) 70, 71

The Great Takeover Binge, Business Week, Nov. 14, 1977 at 176 ..... 15, 17, 97

Wilner & Landy, The Tender Trap: State Takeover Statutes and their Constitutionality, 45 Fordham L. Rev. 1 (1976) ... 14, 16, 68

C. Wright, Handbook of the Law of Federal Court (1976) 32

C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, Jurisdiction § 3806 (1976) 63, 64

Wright, The Advisory Commission on Intergovernmental Relations: Unique Features and Policy Orientation, 25 Pub. Ad. Rev. 193 (1965) 66

113 Cong. Rec. 24,664 (1967) (remarks of Sen. Williams) 79

In the Supreme Court

OF THE

United States

OCTOBER TERM 1978

No. 78-759

DAVID H. LEROY, Attorney General of Idaho,
and TOM D. MCELDOWNEY,
Director of the Department of Finance
of the State of Idaho,
Appellants,

vs.

GREAT WESTERN UNITED CORPORATION,
Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (J.S. App. A-1-A-84) is reported at 577 F.2d 1256 (5th Cir. 1978). The memorandum decision of

the United States District Court for the Northern District of Texas, Dallas Division (J.S. App. A-85-A-125), is reported at 439 F.Supp. 420 (N.D. Tex. 1977).

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming the decision of the United States District Court for the Northern District of Texas, Dallas Division, was entered on the 10th day of August 1978.

Notices of appeal to this Court were duly filed in the United States Court of Appeals for the Fifth Circuit on the 23d day of October, 1978 (J.S. App. A-126-A-127), and in the United States District Court for the Northern District of Texas, Dallas Division, on the 24th day of October 1978 (J.S. App. A-128-A-129).

The jurisdictional statement of appellants supporting their appeal to this Court was docketed on the 7th day of November 1978, within ninety (90) days from the rendering of the final decision below.

This Court noted probable jurisdiction of the appeal on the 8th day of January 1979.

The jurisdiction of this Court rests upon 28 U.S.C. § 1254(2).

QUESTIONS PRESENTED

1. Whether due process or federalism principles will allow a federal court in Texas to assert personal jurisdiction over officials of the State of Idaho, one of whom took no action whatsoever and the other of whom acted solely in Idaho in his governmental capacity by enforcing Idaho law, on the theory that the official acts in Idaho had consequences or practical effects in the State of Texas.

2. Whether a state official acting in his state solely in a governmental capacity by enforcing his own state's laws may be deemed to be "in" or "conducting" business in some other state for purposes of long-arm jurisdiction, state or federal, in the other state.

3. Whether the doctrine of *Ex parte Young*, which permits suit against a state official under circumstances where the Eleventh Amendment would bar a suit against the state itself, may constitutionally be extended to subject Idaho officials acting solely within their governmental capacity in Idaho to suit in a court sited in Texas.

4. Whether enforcement by a state official in Idaho of Idaho law which allegedly conflicts with a portion of the Securities Exchange Act of 1934 constitutes a "violation" of said Act for purposes of federal court jurisdiction thereunder when no specific proscription of thereof has been breached.

5. Whether, in an action brought in Texas by a Texas resident against Idaho officials to invalidate an Idaho statutory scheme on the ground that it conflicts with or is preempted by the Securities Exchange Act of 1934, venue is proper in Texas either because (a) under the jurisdictional portion of the Exchange Act a "violation" occurred in Texas or (b) under general federal venue statutes the claim against the Idaho officials arose in Texas, under a theory that the plaintiff was affected in Texas by the acts in Idaho by an Idaho official in enforcing the Idaho law.

6. Whether Congress has reserved to the States, under Section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), the power to regulate corporate takeover offers in a manner which differs from that adopted in the Williams Act amendments to the Securities Exchange Act of 1934.

7. Whether, independently of Section 28(a), the States have the inherent power to regulate corporate takeover offers in a manner which differs from that adopted in the Williams Act amendments to the Securities Exchange Act of 1934.

8. Whether a federal court may weigh the benefits of a state corporate takeover law against its alleged effect upon interstate commerce.

9. Whether, independently of Section 28(a), state corporate takeover laws constitute an undue burden on interstate commerce.

10. Whether a tender offeror has standing to maintain an action under the Williams Act amendments to the Securities Exchange Act of 1934 to challenge the constitutionality of state corporate takeover laws.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Article 1, Section 8, Clause 3, United States Constitution:

> The Congress shall have Power . . .
>
> To regulate Commerce . . ., among the several States, . . . ;

Article 6, Clause 2, United States Constitution:

> This Constitution and the Laws of the United States which shall be made in pursuance thereof; . . ., shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.

Eleventh Amendment, United States Constitution:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any foreign state.

Securities Exchange Act of 1934, §§ 13(d, e), 14(d-f), 15 U.S.C. §§ 78 m(d, e), 78n(d-f) (1970):

> Because of length of text, reproduced at pp. A-1 to A-9 of Appendix hereto.

Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (1970):

> The district courts of the United States, . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity or actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and

process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. . . .

Securities Exchange Act of 1934 § 28(a), 15 U.S.C. § 78bb(a) (1970):

. . . Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

28 U.S.C. § 1391(b) (1970):

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought in the judicial district where all the defendants reside, or in which the claim arose, except as otherwise provided by law.

Idaho Code §§ 30-1501 to 30-1513 (Supp. 1978):

Because of length of text, reproduced at pp. A-10 to A-26 of Appendix hereto.

Texas Revised Civil Statutes Annotated article 2031b, § 3 (Vernon):

Any foreign corporation, association, joint stock company, partnership, or non-resident natural person that engages in business in this State, irrespective of any Statute or law respecting designation or maintenance or resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such foreign corporation, joint stock company, association, partnership, or non-resident natural person of the Secretary of State of Texas as an agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such corporation, joint stock company, association, partnership, or non-resident natural person is a party or to be made a party.

Texas Revised Civil Statutes Annotated article 2031b, § 4 (Vernon):

For purposes of this Act, and without including other acts that may constitute doing business, any foreign corporation, joint stock company, association, partnership, or non-resident natural person shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or by the committing of any tort in whole or in part in this State.

• • •

STATEMENT

Appellee Great Western United Corporation (hereinafter GWU), a Delaware corporation with executive offices in Dallas, Texas, the controlling interest of which is owned by N. B. Hunt and W. H. Hunt, is traded on the N.Y.S.E. On March 21, 1977, GWU announced its intention to make a tender offer to purchase up to two million shares of stock of the Sunshine Mining Co., a Washington corporation whose stock is traded on the New York and Spokane exchanges. Sunshine Mining Co. has its principal asset, a silver mining operation, in the State of Idaho, with other substantial assets located in the States of New York and

Maryland. The tender offer for shares of Sunshine stock brought into play the federal law disclosure requirements of the Williams Act amendments to the Securities Exchange Act of 1934 as well as, potentially, the disclosure and review requirements of corporate takeover laws of the three states.[1]

Simultaneously, on March 21, 1977, GWU representatives personally appeared at and filed a 13D disclosure statement with the United States Securities and Exchange Commission (hereinafter SEC),[2] personally appeared in Idaho and filed an information statement under the Idaho Corporate Take-Over Law, and approached the proper authorities of the States of New York and Maryland to inquire about the possibility of jurisdiction being asserted under those States' corporate takeover laws. Pursuant to request by a GWU representative that he be informed in

[1]Sunshine's wholly owned subsidiary, Anchor Post Products, Inc., has manufacturing facilities based in Maryland and Sunshine conducts substantial business in New York. Thus the corporate takeover statutes of those two states were arguably applicable to GWU's tender offer as well as Idaho's statute.

[2]The tender offer proposed by GWU was subject to the terms and conditions set forth in a proposed form of an Offer to Purchase and related Letter of Transmittal filed by GWU with the SEC pursuant to Sections 13(d, e) [15 U.S.C. §§ 78m(d, e) (1970)], the Williams Act amendments to the Securities Exchange Act of 1934. The 13D disclosure was required by the same statutes.

In a related case, *Sunshine Mining Co. v. Great Western United Corp.*, (1977-78 Transfer Binder) CCH FED. SEC. L. REP. § 96,049, filed in the United States District Court for the District of Idaho, the court denied Sunshine its requested injunctive relief and specifically found that there were no material omissions in GWU's filings with the SEC. That litigation was dismissed as a result of settlement between the parties on October 5, 1977.

Texas by telecopy[3] of Idaho's response to the GWU filing, on Friday, March 25, 1977, Idaho's Deputy Administrator for Securities of the Department of Finance transmitted to Texas a comment letter requesting disclosure of additional information by GWU (A. 77 to A. 85) and an administrative order issued by Appellant McEldowney delaying the effective date of the GWU tender offer (A. 86 to A.87). At this time GWU was uncertain whether or not Maryland and New York intended to assert jurisdiction.

GWU's sole response to the Idaho letter and order was, on Monday, March 28, 1977, to file an action in the United States District Court for the Northern District of Texas, Dallas Division, against the attorneys general and officials in charge of securities regulation of the States of Idaho, New York, and Maryland. The Complaint alleged, in substance, that GWU was aggrieved by the acts and threatened acts of the Appellants and other Defendants directed toward GWU and that such acts were unconstitutional (A. 1 to A. 18). GWU sought an injunction against the state officials enjoining them from enforcing their state corporate takeover laws and a declaratory judgment that those laws, insofar as they purport to apply to an interstate cash tender offer for the purchase of securities traded on a national securities market (a) represented an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, (b) intruded without warrant into an area preempted by federal regulation in contravention of the Supremacy Clause

[3]Stephen Craig Metzger, an attorney for GWU, suggested to Melvin Baptie, Deputy Administrator—Securities of the Idaho Department of Finance, that he send the Idaho response to Dallas by telecopier. (Trial Tr. p. 441, lines 1-21) (A. 292).

of the United States Constitution, and (c) denied to GWU rights of equal protection of the law and due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and the Civil Rights Act of 1872.

GWU applied to the court for an *ex parte* temporary restaining order against the state officials to prohibit continued enforcement of their challenged state laws. After counsel for the Idaho officials called the court, the matter was continued until 9:00 A.M., Wednesday, March 30, 1977, for a hearing on GWU's motion for a restraining order. At that time counsel for the Idaho official Appellants and the Maryland officials appeared specially and formally moved to dismiss the action for lack of jurisdiction and improper venue. After hearing argument for the Idaho and Maryland officials, accepting exhibits, and having received a brief in behalf of the Idaho officials on the jurisdiction and venue issues, the court granted the temporary restraining order and consolidated a hearing for preliminary injunction and trial on the merits for Friday, April 8, 1977. The court refused Idaho counsel's request for a stay of its order pending an emergency appeal to the United States Court of Appeals for the Fifth Circuit. Idaho counsel, joined by New York and Maryland counsel, thereupon immediately filed a request for emergency appeal to the said circuit court, which was granted, with oral argument thereon scheduled for Tuesday, April 5, 1977. Following a spirited argument by counsel and questioning by each of the three panel members, the circuit court, on April 6, 1977, stayed the order of the district court pending further proceedings therein, ordered the court to consider the issues of jurisdiction and venue and enter findings of fact and conclusions of law thereon before consideration of the merits, and suggested that because the "proceeding involves novel and difficult issues which have broad impact upon federalism" that, should the district court determine that jurisdiction and venue were proper, it should consider interlocutory certification of such determination to the circuit court under 28 U.S.C. § 1292(b) (1970) before trial on the merits (A. 34 to A. 35).

The hearing so ordered was held by the district court in Dallas on April 8, 1977, and on April 21, 1977, the court filed its findings of fact, conclusions of law, and order, which held that no case or controversy existed between GWU and the Maryland officials, but that jurisdiction and venue were proper in the Northern District of Texas over the Idaho and New York officials against whom a case or controversy was deemed to exist. The court declined to make interlocutory certification of the jurisdiction and venue issues to the Fifth Circuit. Mandamus and prohibition petitions as well as petitions for leave to appeal under 28 U.S.C. §§ 1291 and 1292(b) (1970) were presented to the Fifth Circuit which, on May 16, 1977, denied the requested relief.

On May 23 and 24, 1977, the merits of the case were tried to the court with several expert witnesses presenting testimony for each side to the controversy. At the opening of the trial, New York officials advised the court and GWU that that State had decided not to assert jurisdiction over the proposed tender offer. Although attorneys for the New York official defendant participated in the trial, the court ultimately determined that GWU's case against New York was moot and dismissed as to that State official.

On September 2, 1977, the district court issued a memorandum decision in which it considered the issue of standing as well as reiterated its jurisdiction and venue determinations and entered judgment on the merits declaring unconstitutional and enjoining enforcement of the Idaho Corporate Take-Over Law insofar as it purported to apply to GWU's proposed cash tender offer for purchase of securities of Sunshine Mining Co. Specifically, the court held that as applied to the instant case the Idaho Corporate Take-Over Law represented an unconstitutional burden on interstate commerce and intruded without justification into an area preempted by federal securities laws, namely the Williams Act. Judgment was stayed by the district court through September 16, 1977, to enable Appellants to file an application for stay of judgment with the United States Court of Appeals for the Fifth Circuit and to enable that court to consider whether to grant a further stay of judgment pending a ruling of Appellants' application. On September 8, 1977, Appellant McEldowney filed his appeal of the district court decision with the Fifth Circuit, and on September 16, 1977, that court entered its order denying a stay of the trial court's judgment. Oral argument on the appeal was heard on December 13, 1977, and on August 10, 1978, the appellate court decision affirming the district court below (with Judges Wisdom and Clark in the majority, over the dissent of Judge Godbold) was filed. Specifically, the Fifth Circuit held that (a) the district court had subject matter jurisdiction over the controversy, (b) the district court had personal jurisdiction over the defendants by application of the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), (c) the Texas long arm

statute[4] constitutionally authorized assertion of personal jurisdiction over the nonresident state official defendants, (d) section 27 of the Securities Exchange Act of 1934[5] provided an independent source of personal jurisdiction over the defendant Idaho officials, (e) venue in the Northern District of Texas was proper both under § 27 of the Securities Exchange Act of 1934 and the general venue provisions of 28 U.S.C. § 1391(b), (f) the Idaho Corporate Take-Over Law was preempted by federal securities law under the Williams Act,[6] and (g) the Idaho Corporate Take-Over Law was invalid under the Commerce Clause.

Timely appeal to this Court was next pursued by Appellants Kidwell and McEldowney, as above noted.

BACKGROUND OF THE CORPORATE TENDER OFFER

Though a section of the Idaho law in question herein does attempt to define for jurisdictional purposes what a "take-over offer" is[7] such a definition was avoided in federal law.[8] In general terms, a "tender offer" may be

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[4] TEX. REV. CIV. STAT. ANN. art. 2031b, § 3 (Vernon).

[5] 15 U.S.C. § 78aa (1970).

[6] 15 U.S.C. §§ 78m(d,e) and 78n(d-f) (1970); Sections 13(d, e) and 14(d-e) of the Securities Exchange Act of 1934.

[7] IDAHO CODE § 30-1501(5) (Supp. 1978).

[8] The Congress and the SEC continue to decline to define the term "tender offer" for Williams Act purposes, the SEC recently noting:

> In recognition of the dynamic nature of tender offers and the need for the Williams Act to be interpreted flexibly in a manner consistent with its purposes, the Commission affirms its position that a definition of the term "tender offer" is neither appropriate nor necessary at this time. The Commission wishes to emphasize that in its view the term should be understood in

regarded as any method of corporate takeover "sought to be achieved by a large-scale stock purchase program."[9] Both federal law[10] and most state laws, including the Idaho law at issue herein,[11] come into play whenever anyone acquires directly or indirectly the beneficial ownership of more than five percent (5%) of the outstanding shares of a "target company."[12] Historically, cash tender offers for purchase of corporate shares have proceeded before announcement with secrecy, and after announcement with speed.[13] Also typically, as in this instant case, the tender

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a context which furthers the purposes of the Williams Act. Thus, this position should in no way be construed to mean that the term applies only to a so-called "conventional" tender offer.

* * * * *

In the Commission's view, the term "tender offer" is to be interpreted flexibly in accordance with the intended purposes of Sections 14(d) and 14(e) of the Williams Act. Therefore, the determination of whether a transaction or series of transactions constitutes a tender offer depends upon consideration of the particular facts and circumstances in light of such purposes.

Securities and Exchange Commission Release Nos. 33-6022; 34-15548; IC-10575; File No. S7-770 dated Feb. 5, 1979 (17 C.F.R. Part 240) at 25-26.

[9]Lipton, *Open Market Purchases*, 32 Bus. Law 1321 (1977).

[10]Section 13(d)(1) of the Securities Exchange Act of 1934; 15 U.S.C. § 78m(d)(1) (1970).

[11]Idaho Code § 30-1502(1) (Supp. 1978).

[12]The term "target company" is commonly used in the lexicon of corporate takeovers to denominate the company toward which a tender offer is directed, and is defined in Idaho law, at Idaho Code § 30-1501(6) (Supp. 1978). *See* E. Aranow & H. Einhorn, Tender Offers for Corporate Control, Ch. 1 (1973).

[13]Alone, the Williams Act, continues to encourage the "Blitzkrieg" or "Saturday night special" tender offer "and does little, if anything, to restrain the use of panic as a tactic" in encouraging investors promptly to tender their shares. Robinson, *Directors Under Attack in New 'Bear Hug' Mergers*, N.Y.L.J., June 12, 1978, at 41, col. 1. *See also* Wilner & Landy, *The Tender Trap: State Takeover Statutes and their Constitutionality*, 45 Fordham L.Rev. 1, 9 (1976).

offeror (sometimes euphemistically denoted the "raiding company"), shortly prior to public announcement of an "unfriendly" market tender offer at a lower price per share tendered, will quietly approach incumbent management with its "friendly" tender offer which it encourages management to consider favorably and recommend to the target company shareholders.[14] This action is known as the "bear hug"[15] and places target company management in the awkward position of considering in haste an offer to its company's shareholders for purchase of all or a portion of outstanding shares at a price more favorable than will subsequently be offered by public announcement. Management's fiduciary duty to shareholders places them squarely on the horns of a dilemma. Approval of the bear hug offer after hasty consideration could result in potential personal liability if subsequent events determined that factors which should have been considered were not, while disapproval could result in subsequent litigation by shareholders who were dissatisfied with the lower publicly

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[14]As the district court herein noted, the target company (Sunshine) board of directors, on Monday, March 21, 1977, refused to recommend to shareholders GWU's "friendly" offer of $16.75 per tendered share. (J.S. App. A-87, n. 3.) In fact the "friendly" offer was presented to management on Sunday night, March 20, 1977 (after a series of meetings between GWU and Sunshine officials that Friday and Saturday), with those officials given only until Monday morning to announce their decision to accept or reject the "friendly" offer. (Transcript of TRO hearing, March 30, 1977, remarks of Mr. Juceam at pp. 87-88.)

[15]*The Great Takeover Binge*, Business Week, Nov. 14, 1977, at 182, col. 3. *See also* Robinson, *Directors Under Attack in New 'Bear Hug' Mergers*, N.Y.L.J., June 12, 1978, at 25; Flom, *Forcing a Friendly Offer*, Bus. Law, 1319 (1977).

announced price.[16] Once the tender offeror decides to go ahead with public announcement of its tender offer, there is nothing in the federal law to prevent presentation of the offer to shareholders within a truncated time period during which shares must be tendered or the opportunity to tender lost (known as the "Blitzkrieg" or "Saturday night special") and has been said to encourage panic selling.[17] Quite to the contrary, state corporate takeover laws, such as Idaho's,[18] traditionally have a built-in delay period in order to allow shareholders a longer period of time within which to make a considered decision, based upon information required to be filed under the federal Williams Act as supplemented by any additional information required under the state corporate takeover law, before deciding whether or not to tender some or all of their shares of stock in the target company.[19] State corporate takeover laws are criticized as being "tools" whereby entrenched target company management can act to defeat a tender offeror's bid. The fallacy in such a contention is threefold:

[16]In fact, in this instant situation, Great Western United Corp. (a Sunshine Mining Co. shareholder) instituted a stockholder derivative action attacking the agreement between Sunshine and its investment banker on the premise that the agreement was "defensive," with a primary purpose to block the offer by GWU. Great Western United Corp. v. Sunshine Mining Co., 77 Civ. 4500 (S.D. N.Y., filed Sept. 12, 1977). *Discussed in* M. LIPTON & STEINBERGER, TAKEOVERS AND FREEZEOUTS 405 (1978).

[17]*See* note 13 *supra*. *See also* Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 YALE L. J. 510, 510 n. 6 (1979).

[18]IDAHO CODE § 30-1503(3) & (4) (Supp. 1978).

[19]As will be developed below this additional time period provided by state law not only inures to the benefit of shareholders, but also has the collateral effect of allowing incumbent target company management time within which to muster defenses to the takeover bid, or to seek a "white knight" new bidder who will offer a higher price to the shareholders.

(i) state laws do not keep management in but, instead, allow entry into the takeover bidding process of other offerors who may raise the price investors receive for their shares yet would act just as quickly to oust inept incumbent management as would the original bidder; *(ii)* any successful bidder would be foolish to oust highly efficient, well respected incumbent management who, if allowed to continue, will more likely enhance the value of the offeror's acquisition than new, untried management; and *(iii)* if the target company is interesting at all, once the takeover bidding process is initiated *someone* will in all likelihood take over control of the target company.

Though writings about the state corporate takover laws' relationship with the federal Williams Act requirements are replete with pro and con discussions about preemption and burden on commerce (or the lack thereof), the fact remains that "almost all the companies that have been the targets of takeover bids have eventually been gobbled up, although not always by the original bidder."[20] One of the most prominent and active attorneys in the tender offer field has commented: "No major tender offer has gone through a state hearing with the original offeror getting the target at the original price. * * * In most cases, the target arranged a deal with a white knight at a higher price."[21] In such cases, where the original tendor offeror is unsuccessful due to a higher bidder, "the losing bidder

[20]*The Great Takeover Binge*, BUSINESS WEEK, Nov. 14, 1977, at 177, col. 2.

[21]Fitzhugh, *Tender Offer Issue Set for Court Showdown*, N.Y.L.J., May 18, 1977, at 6, col. 4 (quoting remarks of Martin Lipton, Esq., of the New York bar).

who has gradually acquired some of the target company's stock comes out with a capital gain."[22]

SUMMARY OF ARGUMENT

I. It is well to remember that the landmark *Ex parte Young*, 209 U.S. 123 (1908), decision created a fiction for overcoming Eleventh Amendment proscriptions against suing a state directly. Following the thrust of the *Young* action itself, brought in a federal court in Michigan at the residence of the Attorney General of Michigan to challenge allegedly unconstitutional action he had taken under Michigan law as an official in a governmental capacity, there is *not one* reported case in which a state official has been deemed amenable to suit outside the jurisdiction in which he officiates. In fact, the only two reported cases on the issue hold that the challenged official must exclusively be sued at his official residence. Thus, the *Young* fiction has the limited ability to strip locally the cloak of sovereign immunity from a challenged official, but does not force him to stand naked before courts anywhere in the Nation.

II-A. In this instant case, two Idaho state officials were held amenable to personal jurisdiction by a federal district court in Texas by applying that State's long arm statute and its "doing business" concepts. Appellee GWU successfully argued below that the Idaho official Appellants were deemed to be "doing business" in Texas in that term's necessary commercial context merely because they, in Idaho, applied the terms of Idaho law to a corporation whose principal offices were in Texas—and the effect of the application of Idaho law was deemed to have repercussions ("effects" or "consequences") in Texas (as well as other states), thus making the Idaho officials amenable to suit in Texas courts. Despite the fact that these officials were behaving in Idaho in a purely governmental capacity—as opposed to a private or proprietary capacity—they were deemed in "business" under the Texas long arm statute. This jurisdictional conclusion was reached notwithstanding that Appellant Idaho Attorney General Kidwell (now Leroy) took no action whatsoever in Idaho or elsewhere. His only involvement is that of being an Idaho official charged with general duty to enforce Idaho law, and specific duty to enforce the challenged law if called upon to do so by the Director of the Idaho Department of Finance (Appellant McEldowney). Appellant Kidwell undertook no independent action, nor was he called upon by Appellant McEldowney to take action—he was merely anticipatorily sued by Appellee Great Western United Corp., and that remains to this date his singular connection with this litigation. Moving to the next level of personal jurisdiction inquiry under the Texas long arm statute, the courts below ruled that due process and fundamental fairness inquiries were satisfied on the basis that the Appellants somehow *might have* availed themselves of the benefits of Texas law. How this was to be accomplished—Idaho officials somehow coming to Texas without benefit of an Idaho court judgment susceptible to full faith and credit treatment and expecting to have the support of Texas law to enforce Idaho law in Texas—was never developed. More-

[22] *Id.* (author's comment). It has been noted that: "Many offerors will decide to accumulate a 4.9 percent interest in the target in order, if they are topped by another bidder when the target seeks a defensive merger, that they, the original bidder, come away with a profit." Lipton, *Open Market Purchases*, 32 Bus. Law. 1321 (1977).

over, the continuing reliance on such cases as *International Shoe, Hanson v. Denckla,* and *Shaffer v. Heitner*—all of which arose in a commercial, profit-oriented context—to sustain constitutional propriety of asserting long arm jurisdiction over Idaho officials acting solely in Idaho, solely in a governmental capacity, appears wholly unfounded. To analogize, while it would seem quite equitable for a mail order company based in Texas to be deemed amenable to suit in Idaho courts as a result of either defective merchandise or other consequences of commercial activity which was acted upon by an Idaho resident, it would be inequitable for the Texas company to sue the Idahoan in Texas courts for a default in payment. On the one hand, the Texas-based company is asked by the courts to pay a "price" for the privilege of conducting commercial ("business"), profit-seeking (though not necessarily profit-making) activities nationwide (or at least in Idaho), yet the fortuity of the Idahoan acting on the solicitation by the Texan is not grounded in the same commercial soil. The "fairness" of the Texan's defending an action in Idaho is merely a result of an initial election to enter into commercial activity. To utilize this same commercial rationale toward Idaho officials is clearly improper under federalism concepts and an affront to due process and fundamental fairness standards announced by this Court, particularly as recently discussed in *Kulko v. Superior Court,* 436 U.S. 84 (1978). That the assertion of Texas long arm jurisdiction over the Idaho officials by the courts below was clearly wrong is made more evident by the fact that Appellee GWU voluntarily came to Idaho and there made a voluntary

filing under the challenged Idaho law before retreating to Texas to file this action.

II-B. An action against the Idaho official Appellants will lie under section 27 of the Securities Exchange Act of 1934 only if subject matter jurisdiction, personal jurisdiction, as well as venue are found thereunder.

1. Subject matter jurisdiction was asserted over this action on the grounds that the non-resident Idaho officials acting to enforce or being charged with the enforcement of an Idaho law alleged to be in "conflict" with federal law for purposes of section 28(a) of the Securities Exchange Act of 1934, somehow "violated" the 1934 Act notwithstanding the fact that no specific proscription of that Act was breached. Simply stated, though unlike other portions of the 1934 Act under which "violations" have been found to occur—all of which contain mandatory language—the courts below adopted a standard that alleged "conflict" equals "violation" for jurisdictional purposes. Interestingly, in interpreting application of the section 28(a) "conflict" term, the SEC has deemed that word to apply only to impossibility of compliance with both state and federal law, rather than mere inconvenience or overlap, as alleged here. Nowhere has it ever before been asserted or held that state officials, themselves regulators, were susceptible in their regulatory capacity to being treated just as are traders who wrongfully or fraudulently act in the commercial securities field. Furthermore, it is clear that the Idaho Corporate Take-Over law merely fleshes out and adds substance to the skeletal requirements of disclosure and regulation in cash tender offers under the federal Williams Act. Though the Idaho law requires more effort to comply with than does the fed-

eral Williams Act there is no demonstrated impossibility of compliance with both. Inconvenience or delay occasioned by compliance with Idaho law in addition to federal law inures to the detriment solely of an initial takeover bidder who hopes that merely by complying with federal law it will be able to pull off a short-fused tender offer and accomplish its desired takeover bid before the market, the target company, or potential competitive takeover bidders have a chance to respond. The raiding company seeks the "Blitzkreig" or "Saturday night special" rapid tender offer to achieve its takeover goals quickly and cheaply; the shareholders of the target company deserve the additional disclosure and delay brought into the cash tender offer process by state law so that they may make informed, deliberate choices and benefit by any higher market prices occasioned by the appearance of competing offerors who bid up the prices to be offered shareholders. Thus, the Idaho law does not conflict with nor make impossible performance under federal law, and Idaho officials do not "violate" federal law by enforcing Idaho takeover law.

2. Personal jurisdiction under section 27 of the 1934 Securities Exchange Act is lacking thereunder on constitutional grounds as it is under the Texas long arm statute. In finding Texas jurisdiction under section 27, the courts below did not rely on any contacts of the Appellants peculiar to Texas, but, instead, employed a standard which based personal jurisdiction on the fact that acts, real or threatened, by the Idaho officials had practical extraterritorial "effects" or "consequences" which were felt in that State. For the same reasons discussed above regarding the

Texas long arm statute, personal jurisdiction lacks constitutional foundation.

III. Applying the venue portion of section 27 of the Securities Exchange Act of 1934 as well as the applicable general venue statute to the facts of this case, it is readily apparent that all actions *by any Appellant* occurred in Idaho as a direct consequence of the action of Appellee in voluntarily coming to Idaho and submitting to Idaho Corporate Take-Over Law jurisdiction. Though the courts below found certain justification for Texas venue in the fact that a comment letter requesting additional information and an order delaying the effective date of GWU's tender offer were sent from Idaho to Texas by means of an instrumentality of interstate commerce, that mode of transmission was requested by a GWU official. More fundamentally, however, the situs of venue should not turn on such a flimsy basis (which would, arguably, be defeated had Idaho informed GWU personnel that the only way it could learn of Idaho action on its takeover filing was to come to Idaho to receive it). What seems to have been overlooked is the fact that venue is a defendant's right, yet the weighing of "significant contacts" with Texas as a basis for venue was accomplished by adding up matters of impact to the plaintiffs. As state officials, though stripped of a sovereign immunity cloak for subject matter jurisdiction, the Appellants remain entitled to assert the place of their official residence, Boise, Idaho, as the only proper place of venue for this action. However the circumstances of this case are categorized—as the place in which the defendants "transact business" for section 27 purposes, or where the "claim arose"—there is only one state, Idaho, where venue is proper. As already

noted, these Defendants/Appellants do not "transact business" anywhere; they are government official regulators, not businessmen. The categorization of their regulatory activities as their "business" perverts that word to a context never intended in jurisdiction and venue issues. That the claim arose in Idaho is evident from the fact that everything that led up to the complained-of action took place in Idaho, as did the action itself which precipitated this lawsuit. There can only be one place in which venue is proper; that place is the District of Idaho.

IV. Case law makes it clear that state statutes are entitled to a presumption of constitutional validity and that federal preemption, though it need not be express, must be obviously implied in order for a state law to be swept aside. Conflict analysis in the preemption field demonstrates that for a conflict between state and federal law to create a preemption of state law there must be a practical impossibility of compliance with federal law as a result of the state incursion into the regulated field. In the context of what the Williams Act provides regarding corporate takeovers, it is clear that the federal law introduces only the barest of requirements of reporting and disclosure, rather than a pervasive, inclusive federal regulatory pattern. In this arena, state laws like Idaho's supplement federal investor protection by requiring tender offerors to make additional disclosures for the benefit of target company shareholders and provide a delay factor so that shareholders may make an informed decision whether or not to tender. No impossibility of performance with the two laws is created, and the additional burden of Idaho law requirements is clearly warranted by its additional protections

which almost invariably inure to the benefit of shareholders as a result of delay and additional disclosure—usually resulting in a higher offering price either by the original offeror or a successor as an auction market for target company shares develops. State laws reduce the chance for a tender offeror to invade the market with a hasty Saturday night special, Blitzkrieg offer which is effected in eight to ten days (or less). As this Court has pointed out, the courts should not presume a congressional intent to occupy a field where such an intention is not *clearly* manifested. Since SEC officials and congressmen as well as others knowledgeable in the field of tender offers suggest that Congress *should* act to preempt state takeover laws, the implication is clear that Congress has to date refused so to act. Until Congress does act affirmatively to preempt, or takes action to flesh out the Williams Act from its present skeletal form, state laws serve a valuable function and provide a national laboratory from which Congress may observe and benefit in its future dealings in the securities field. The continued existence of Securities Exchange Act of 1934 section 28 authorization for non-conflicting state laws in the securities field also contributes to the idea of a state right to legislate local regulation of tender offers. Congress must be presumed to have known when it engrafted the Williams Act onto the Securities Exchange Act of 1934 that the well-recognized section 28 would affect it.

Any delicate balance between tender offeror and target company suggested as a collateral "purpose" in 1968 passage of the Williams Act—already discounted by this Court's decision in *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977), that the Act's sole purpose was investor pro-

tection—must be discounted at the present time inasmuch as 1970 amendments to the Act itself have upset this "balance," as have the 1976 Hart-Scott-Rodino Antitrust Improvements and as will the most recently proposed new SEC rules with their longer delay period. The evidence against federal preemption is overwhelming.

V-A. In assessing a state law's burden on interstate commerce in an area where state and federal law traditionally coexist, a court should not indulge in weighing benefits of that law against its alleged effect on commerce. State takeover laws operate in the field of securities law, which has a long history of concurrent state-federal regulation. Legislative judgment of what is or is not beneficial should remain outside the judicial province if separation of powers is to remain a viable concept.

V-B. A three-step analysis, provided by *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), should be employed in determining whether a state law unduly burdens interstate commerce.

1. In determining, initially, whether a state law promotes a legitimate state interest, actual effects, rather than speculation, should be assessed. That the challenged Idaho works a detriment to the initial tender offeror is recognized. Yet, this "detriment" to the offeror (who nowhere has a federally-protected "right" to engage in a tender offer) results in substantial benefits to the prime beneficiaries of the state laws—the target company shareholders. Even a witness of Appellee concedes that delay occasioned in tender offers—such as generated by state laws—has almost always resulted in shareholders being offered more for their

shares than they would have received if the offer had gone through quickly. Additional information provided to shareholders through state laws assists in formulating the critical investor decision of how many, if any, shares to tender, and gives the shareholder some indication of what the offeror plans for the company if the takeover is successful. The tender offer does not merely involve a simple, mass securities transaction. In all likelihood many of the tendering shareholders (through pro pro rata application in a partial tender offer or as a result of not tendering all shares owned) will remain investors in the reconstituted target company, and have a true need to know what is planned for its future—knowledge furnished by the more broad scope information brought out by state law. The tender offer which goes forward under the type of deliberative and informative process occasioned by the additional requirements of state takeover laws more closely resembles other means of transfer of corporate control—merger, sale of assets, stock tender offers, proxy battles, and the like—in which delay and broad information dissemination are required by state and federal law. Without the additional protection to investors afforded by state law such as the Idaho Corporate Take-Over Law the cash tender offer is primarily a device whereby an offeror, acting in great haste after a surprise announcement, can in a very brief period of time obtain control of a target company at a bargain price. While such a procedure certainly benefits the tender offeror, it may well work to the detriment of the shareholders of the target company who remain ill informed, required to make a hasty decision, and denied the benefit of an open, auction market for their shares. Though it is certainly true

that incumbent management of a target company may choose to attempt to forestall or defeat a particular tender offer by resort to procedures available to it under a state takeover law, resort to such devices may be a breach of fiduciary duty are but one means of counter-action on a variety of planes already available for use in challenging the take-over bid. At any rate, the Idaho Corporate Take-Over Law provides protection for shareholders as a primary goal, not devices for use to defeat tender offers. That a "friendly" tender offer which is approved by target company management is exempt from the Idaho law's purview is simply the expression of a belief by Idaho that the existing fiduciary responsibilities to shareholders already imposed by state law are sufficient to insure proper action by target management, and there is no need under such circumstances for an overlay of additional state regulation. The Idaho law is but a logical extension of the minimal requirements of federal law under the Williams Act.

2. The extraterritorial reach of the Idaho Corporate Take-Over Law remains its most highly criticized attribute, in that the law affects shareholders of the target wherever they live so long as the target company meets the criteria for inclusion under the aegis of the Idaho law. Target companies which are incorporated in Idaho or which have their principal offices together with substantial assets in Idaho are governed by Idaho law. Asserting jurisdiction over activities relating to the target incorporated in Idaho is simply a logical extension of traditional internal affairs regulation of corporate activities by state law. Application of the same regulation to corporations, pseudo-foreign in nature, whose principal activities occur in Idaho is also an

accepted internal affairs type of regulation. That such regulation cannot be effected by Idaho if limited to shareholders living in Idaho is obvious, for loss of the extraterritorial reach of the Idaho Corporate Take-Over Law would simply mean that takeover bidders for a company subject to the Idaho law would simply avoid the Idaho law by refusing to make their tender offer to Idaho shareholders. The state law design as a means of shareholder protection would then, in fact, work to the detriment of Idaho shareholders who would be excluded from the tender offer. Because target management itself, through its high fiduciary responsibility to shareholders, is in essence an "embodiment" of all shareholders and must act in their best interests in any takeover bid there is additional rationale for Idaho asserting the protection of its Corporate Take-Over Law over tender offers directed toward corporations in Idaho subject to the Idaho law regardless of where in this Nation the target shareholders live. Application of this type of internal affairs regulation by state law already pervades all other means of change in corporate control, and is well accepted. Even Congress noted the similarities between a tender offer and proxy contest and was motivated by the relationship in passing the Williams Act.

3. The final prong of the *Pike* analysis involves assessment of the burden of state law on interstate commerce to determine whether or not it is excessive. Unlike commerce clause situations in which state laws have been struck down because of a need for uniformity of law in a particular field, the field of securities regulation has since its very beginnings existed with dual state and federal

regulation—and there appears to be no congressional interest in upsetting that balance by federalizing that portion of corporate law relating to securities. Though the courts below opined that operation of the Idaho Corporate Take-Over Law "stopped" 31 million dollars of interstate commerce, it should be pointed out that this "stoppage" was as a result of GWU's absolute failure and unwillingness even to attempt to comply with Idaho law, after initially submitting voluntarily to Idaho jurisdiction, rather than as a result of any undue delay occasioned by operation of the Idaho law during compliance by GWU. Thus, the challenge is made on the basis of effects occasioned by noncompliance with Idaho law, rather than by compliance therewith. Such analysis is inappropriate in assessing "burden" of actual effect of Idaho law on interstate commerce, and would assuredly lead to the downfall of most state laws. The effect of compliance is what should be assessed, and Idaho submits that the effect of compliance is merely a slight additional expense occasioned by additional disclosure requirements and possible hearings—plus the possible loss of an opportunity quickly to acquire control of the target at a bargain. This effect is more than offset by the attendant benefits which target company shareholders reap from the additional information brought out by Idaho law and the ability of delay to bring competitive market factors to bear on the tender offer process. The "burden" on interstate commerce is slight—and appropriate.

V. *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977), left open the question whether a tender offeror suing for injunctive relief under the Williams Act had standing to

sue. In this instant case, the facts are further complicated by GWU's status, not as a tender offeror, but merely as a *potential* tender offeror, thus in a posture similar to the potential purchasers or sellers of securities who were denied standing by this Court in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). Since the Williams Act is designed for shareholder protection, standing thereunder should be limited to those beneficiaries, and, although GWU is a Sunshine Mining Co. (the target) shareholder, it is not in that capacity that this action was brought.

VI. Appellant Idaho Attorney General Kidwell (now Leroy), as Appellee points out, did not appeal to the circuit court from the district court's decision. Yet, the circuit court, after initially noting this fact, proceeded to analyze this case and make its disposition as though both Idaho official defendants were before it, and the affirmance by that court of the district court decision clearly again affected Appellant Kidwell's rights. Accordingly, Notice of Appeal in behalf of both Idaho defendants was filed below with both the district and circuit courts in order to assure that the rights of Appellant Kidwell which continue to be affected will finally be resolved by this Court, as they should be.

ARGUMENT

I

THE FICTION OF EX PARTE YOUNG SHOULD NOT BE EXPANDED BEYOND THE LIMITED JURISDICTION IT ALLOWS OVER STATE OFFICIALS BY CIRCUMVENTING ELEVENTH AMENDMENT PROHIBITIONS

The landmark *Ex parte Young,* 209 U.S. 123 (1908), decision, allowing circumvention of Eleventh Amendment prohibitions of suits against a state by suing personally a state official attempting to use the state's name to enforce state law *alleged* to be void because unconstitutional, continues to stir up comment. Professor Charles Alan Wright points out that the case contains its own illogic inasmuch as the action was brought under the Fourteenth Amendment—which runs only to states, not individuals—but that the relief sought could only be granted against a state official stripped of his cloak of sovereignty.[23] Thus is created the anomaly that enforcement of state law is "state action" for Fourteenth Amendment purposes in bringing an action, but is merely the individual wrong of a person, bearing a state official title, for purposes of the Eleventh Amendment. Perhaps the ultimate irony of *Young* is the fact that several years later this Court ruled in the *Minnesota Rate Cases (Simpson v. Shepard),* 230 U.S. 352 (1913), that the railroad rates challenged in *Ex parte Young* were constitutionally permissible. However, the *Young* doctrine of suit against state officials in their individual capacity is well ingrained in our jurisprudence.

[23] C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 48 at 185 (1976).

Though the cases which have utilized *Young* are now legion, none of the cases raise the personal jurisdiction and venue procedural problems raised herein. *Every* reported case in which the *Young* doctrine has been employed has been brought in the federal judicial district in which the challenged state official was resident in his official capacity. *Every* such reported case involved application of state law by an official acting within his own state. And this evidences a procedural pattern which flows from the *Young* case itself inasmuch as that case was brought in federal court in Minnesota to challenge a Minnesota official's enforcement of a Minnesota law. *Young* involved no question of jurisdiction outside the state whose statutes were being challenged—yet the out-of-state plaintiffs faced the prospect of being subjected to the consequences of Attorney General Young's actions in their home states, not merely in Minnesota.

On the rare occasions when a plaintiff has *attempted* to bring action against a state official in a forum outside the state wherein he officiates, personal jurisdiction has been denied. In 1972, pyramid scheme promoter Glenn Turner brought suit in the District of Vermont against the attorneys general of 25 states.[24] The court found personal jurisdiction fatally lacking and ruled that Turner's proper course of action was an individual lawsuit against each attorney general in his own state. There is an appealing logic to the result inasmuch as Turner's action against the attorneys general sprang from the fact that the profit motivated activities he was promoting in each of their jurisdictions gave rise to state action against him, and was the

[24] Turner v. Baxley, 354 F.Supp. 963 (D. Vt. 1972).

source of his retaliatory complaint against the officials. It was Turner's presence in the various jurisdictions through activities of his several companies which led to the litigation against him in each of the 25 states, just as in this instant action it was Great Western United Corp.'s presence in Idaho (and submission to Idaho jurisdiction under the Idaho Corporate Take-Over Law) which gave rise to the administrative order which precipitated GWU's suit in Texas against out-of-state officials.

In 1976, the District of Idaho federal court dismissed a case, sua sponte, against members of an autonomous agency of the State of Washington, who were never present in Idaho, on the ground that maintaining such an action, though not objected to by the Washington officials, would violate due process norms.[25]

The consistent pattern of allowing suits against state officials to be brought *only* in those federal courts sited in the state of which the challenged individual was an official has been broken solely by this instant case. This action is both without precedent and unjustified, and should not be allowed as an extension of the *Young* fiction.

[25]Idaho Potato Comm'n v. Washington Potato Comm'n, 410 F.Supp. 171 (D. Idaho 1976). Though the Washington officials had appeared in the case without challenging jurisdiction, the court ruled sua sponte that it lacked personal jurisdiction over the foreign commission members who "were never physically present in Idaho; rather their activities occurred in Washington and had an alleged effect in Idaho," with the court further observing that "[i]t is doubtful that the individual members . . . could reasonably have anticipated that their activities in Washington could subject them to personal liability in a distant [sic.] state." *Id.* at 182.

II

JURISDICTION OVER IDAHO OFFICIALS BY A TEXAS FEDERAL COURT VIOLATES DUE PROCESS AND FEDERALISM PRINCIPLES

A. Personal Jurisdiction Under the Texas Long Arm Statute Is Improperly Applied Against Idaho Officials Who Were Neither Present in Texas Nor Acting in Any Capacity in Idaho Other Than a Governmental One

1. Overview

GWU alleged, and the courts below agreed, that the defendant state officials were within the Texas long arm statute's definition of:

> * * * non-resident natural person that engages in business in [Texas], * * * , and does not maintain a regular place of business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, [whose] act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such * * * non-resident natural person of the Secretary of State of Texas as agent upon whom service of process may be made * * *.[26]

Nowhere was it alleged that the out-of-state officials were among those persons *required* by Texas law to designate an agent; thus they could fall within the long arm statute purview only if they were somehow deemed to "engage in business" in Texas. The flaw in this syllogism involves the allegation that non-resident Idaho officials—acting in their individual capacity in allegedly exceeding their authority

[26]Tex. Rev. Civ. Stat. Ann. art. 2031b, § 3 (Vernon).

as state officials enforcing state law, under the *Young* theory—were engaged in "business" by acting to enforce or being charged with enforcement in Idaho of Idaho law enacted pursuant to Idaho's police power. Enforcement of Idaho law must be deemed a police power activity in which the State of Idaho, through its officials, acts in a governmental—not proprietary or commercial—capacity. Though courts have been exceedingly liberal in allowing broad scope definitions of what constitutes "doing business" under long arm statutes—so long as due process standards are met—it is inconceivable that the farthest reaches of such indulgence could place a "business" context overlay on action in a governmental capacity. Such a course would imply a commercial sense which, if applicable to state or state official action at all, could only conceivably apply to action of a proprietary or commercial nature—not governmental action.[27] The courts below, however did not address this fundamental issue in asserting that jurisdiction is available over the Idaho officials through the Texas long arm statute.[28]

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[27]*See* Martiniak, Hall v. Nevada: *State Court Jurisdiction Over Sister States v. American-State Sovereign Immunity*, 63 CAL. L. REV. 1144 (1975) in which the author suggests that a state should be immune from suit in another state if its interest is governmental, but not if its interest is merely proprietary. This ties in with this Court's extension of jurisdiction to out-of-state defendants who are engaged in commercial, profit oriented business activity or those who have caused a tort in the forum state, but rarely to others.

[28]The only reference to this issue is its cursory dismissal by the district court in its Conclusion of Law, prepared after the circuit court-ordered jurisdiction and venue hearing, that the statute's doing business terminology "has no commercial import." (Findings of Fact and Conclusions of Law, filed Apr. 21, 1977, ¶ 13 at 6.) Thus the well recognized governmental-proprietary distinction was not addressed on its merits. The circuit court made light of the issue by stating that "Idaho's 'business' is to regulate," and that Idaho conducted that "business" in Texas. 577 F.2d at 1268 (J.S. App. A-18).

Beyond the commercial overtones of "doing business" in the long arm statute sense are the pervasive constitutional due process requirements of any jurisdictional statute. One aspect is the "minimum contacts" analysis mandated by *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The facts of this instant case reveal that agents of GWU physically presented themselves in Idaho to make a voluntary filing under the Idaho Corporate Take-Over Law. Other agents of GWU made inquiry of New York and Maryland officials regarding applicability of those states' takeover laws. Though Maryland and New York did nothing as a result of the inquiries, Idaho—at the request of a GWU official[29]—telecopied its comment letter requesting additional information of GWU and administrative order delaying the effective date of the tender offer to GWU in Dallas, Texas. Thus, the sole contacts with Texas were the comment letter and order sent to Texas from Idaho at GWU's request. These "contacts" hardly seem sufficient to establish the constitutionally necessary relationship with the forum jurisdiction. If the telecopying to Texas is the operative fact allowing Texas jurisdiction, would not such jurisdiction have been defeated if Idaho had required GWU's agents to come to Idaho to receive Idaho's response to the GWU filing under Idaho law, rather than using an instrumentality of interstate commerce to convey the information. Such a narrow reading and application of the "minimum contacts" principle would be unsound, yet the courts below did find that the contact of the Idaho officials met *International Shoe* criteria.

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[29]Testimony of Mr. Metzger. (Trial Tr., 441) (A. 292).

International Shoe, however, makes it clear that the contacts contemplated must be of substance, not merely fabricated from happenstance:

> Whether due process is satisfied must depend * * * upon the quality and the nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. * * *
>
> * * * [T]o the extent that a corporation exercises the privilege of conducting activities in a state, it enjoys the benefits and protections of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within a state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.[30]

The facts of the case and substance of this Court's decision make it clear that *International Shoe* standards, allowing use of a foreign state forum under certain circumstances, was directed *exclusively* at commercial, profit-oriented enterprise. It cannot seriously be maintained that the Idaho officials involved herein would be entitled to enjoy any "benefits and protections" of the laws or courts of Texas in any attempt to come to Texas in a governmental capacity to apply and enforce Idaho law. No Texas statutory law would allow such conduct, nor would any articulated legal principle—in fact, Texas' sovereignty would preclude it. Actually, quite the converse was true; Texas law—the long arm statute—was used against the Idaho officials. Clearly, the justification for exercising long

[30]326 U.S. at 319.

arm jurisdiction consistent with the due process requirements of *International Shoe* and its companion cases is missing in this instant action. Yet another problem surrounds the concept of exercising a "privilege of conducting activities in a state."[31] The phrase implies that the forum state accedes to the conduct of certain activities within its borders, and that a charge exacted for allowing such conduct is the amenability of the acting person or entity to suit in the forum's courts. This phrase would mean that for due process to be satisfied Texas would have to grant the Idaho officials a right of conducting Idaho governmental activities—exercising Idaho police powers—within Texas. Not only does such a process defy federalism and sovereignty principles, but it simply did not occur.

2. Appellants were not "engaging in business" in Texas.

In determining the propriety of asserting Texas long arm jurisdiction, courts must approach the issue on two levels of inquiry. On the first level, the exercise of jurisdiction must be within some statutorily conferred authority.[32] If the bare statutory requirements of the long arm statute have been satisfied, a court must next determine whether the defendant has had sufficient minimum contacts with the state wherein the court has jurisdiction so as to permit an exercise of that jurisdiction over that defendant consonant with fundamental fairness and due process consid-

[31]*See also* Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[32]Product Promotions, Inc. v. Costeau, 495 F.2d 483, 492 (5th Cir. 1974); Jetco Electronic Indus., Inc. v. Gardiner, 473 F.2d 1228, 1232 (5th Cir. 1973).

erations.[33] The burden of demonstrating that a court may properly assert long arm jurisdiction over a defendant lies with the plaintiff,[34] rather than with the imagination of the court. It appears, however, that in this instant case attention was focused solely on the second, due process, issue without ever demonstrating the nexus of the Idaho officials to the first issue of whether the Texas long arm statute by definition covered them.

Under the above-quoted portion of section 3 of the Texas long arm statute, jurisdiction over a non-resident person who engages in business in Texas is proper in any action arising out of that business.[35] Section 4 defines acts which constitute "doing business" and includes the catch-all phrase: "other acts that may constitute doing business."[36] Since no tort or contract is involved herein resort must be had to the catch-all provision regarding "other acts." Yet, the alleged "business" activity was never defined, other than the circuit court's assertion that "Idaho's 'business' is to regulate."[37] No attempt was made to analyze how governmental regulation might be deemed synonymous with traditional notions of "business" activity.

[33]International Shoe Co. v. Washington, 326 U.S. 310 (1945); Hanson v. Denckla, 357 U.S. 235 (1958); Kulko v. Superior Court, 436 U.S. 84 (1978).

[34]Product Promotions, Inc. v. Costeau, 495 F.2d 483, 489-90 (5th Cir. 1974).

[35]TEXAS REV. CIV. STAT. ANN. art. 2031b, § 3 (Vernon).

[36]"* * * [W]ithout including other acts that may constitute doing business, any * * * non-resident natural person shall be deemed doing business in this State by entering into any contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State. TEXAS REV. CIV. STAT. ANN. art. 2031b, § 4 (Vernon).

[37]577 F.2d at 1268 (J.S. App. A-18).

Further focusing attention on the first level of long arm jurisdiction inquiry as it relates to this case, it readily becomes apparent that of all the named officials of Idaho, Maryland, and New York who were sued by GWU, *only one* defendant—Idaho Director McEldowney—took any affirmative action whatsoever in any state. Defendant-Appellant Idaho Attorney General Kidwell (now, Leroy) at no time took action or threatened to take action against GWU, nor was he ever even contacted by GWU. His sole relationship to this lawsuit is the fact that the Idaho Corporate Take-Over Law[38] charges him with a duty of enforcement only upon reference of a matter to him by the Director of the Idaho Department of Finance. No such reference was ever made or alleged. The single defendent who engaged in any activity whatsoever was Director of the Idaho Department of Finance McEldowney who: (*i*) reviewed in Idaho the registration statement voluntarily filed in Idaho by GWU under the Idaho Corporate Take-Over Law, *(ii)* authorized his Deputy Administrator for Securities Baptie to issue a comment letter about the registration statement and a request for additional information by transmitting the same—at GWU's request—by telecopier from Idaho, *(iii)* issued an administrative order from Idaho, by the same means of transmission, delaying the effective date of GWU's proposed tender offer; and *(iv)* acted to defend himself when sued in Texas by GWU. Nowhere

[38]IDAHO CODE § 30-1509 (Supp. 1978). Under this section, the Director may bring an action for injunctive relief in the name of the state in any court of competent jurisdiction, "or he may refer the matter to the attorney general or the proper prosecuting attorney." This is not to imply that it would not be proper for the attorney general to exercise his general powers in behalf of the State of Idaho to seek injunctive relief of a violation of Idaho law.

during the course of the proceedings herein has reference been made to any legal authority whatsoever even intimating that such a course of activity by an Idaho official, enforcing within his own state boundaries an Idaho law, might somehow be construed as "doing business" in Texas merely because the net result of his regulation in Idaho was felt in Texas. All the other defendants in GWU's suit, including Appellant Kidwell, could hardly be deemed to be "doing" anything—since they took no action whatsoever—let alone "doing business" in Texas. The Texas Supreme Court has recently refused to engage in defining semantical nuances surrounding the concept of "doing business" for Texas long arm jurisdiction purposes,[39] reaffirming that the statute reaches as far as federal constitutional requirements will permit, while emphasizing that its construction allows courts to focus on constitutional issues rather than engaging in technical and abstruse attempts time and again to define "doing business." However, in the *U-Anchor* case a statutorily-defined form of "doing business"—a contract—was involved, as opposed to this case where no previously identified form of business activity forms the nexus for asserting long arm jurisdiction. Somehow, the threshold level of inquiry must meet legal criteria before one may proceed to the next, constitutional, level of inquiry.

3. Constitutional due process and fundamental fairness were lacking.

Assuming arguendo that the first step of the two step long arm jurisdiction analysis had been satisfied, assertion of jurisdiction must fail under the second level of inquiry.

[39]U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760, 762 (Tex. 1977), *cert. denied*, 98 S.Ct. 1235 (1978).

The sum and substance of the alleged "activity" in Texas was the claim that action, real or threatened, in other states had a practical effect of regulating GWU's Texas-based activities—had consequences in Texas. Yet, if GWU chose to conduct its operations in the proposed tender offer here involved from some state other than Texas the same "effect" or "consequence" rationale would apply to assertion of jurisdiction over the Idaho officials by a court in that state. And, if GWU chose to conduct its takeover activities herein from more than one state, under the same rationale jurisdiction would be available in any of those several states. Such a conclusion conflicts sharply with the previously noted *Hanson v. Denckla* and *International Shoe* requirements. Contrary to the unwarranted speculation indulged in by circuit court,[40] in all likelihood activity in Texas by Idaho officials would make them subject to sanction or even penalty under Texas law rather than subject to its benefits and protections. The result-oriented discussion of these constitutional issues by the courts below fail to meet the further *International Shoe* requirement that purposeful conduct by a defendant must be of such a nature that it should be foreseeable to that defendant that he might thereby be subjecting himself to the forum's jurisdiction.[41]

Hanson v. Denckla further teaches that a forum state:

> does not acquire • • • jurisdiction by being the "center of gravity" of the controversy, or the most convenient

[40]577 F.2d at 1269 (J.S. App. A-20 - A-21). We deal here with a mere administrative order emanating from Idaho, not a judicial decree and full faith and credit issues.

[41]*See* Kurland, *The Supreme Court, The Due Process Clause and The In Personam Jurisdiction of State Courts*, 25 U. Chi. L. Rev. 569, 621 (1958).

> location for its litigation. The issue is personal jurisdiction, not choice of law.[42]

The circuit court use of the concept of "regulation of Great Western's Texas-based business activities" and implication regarding the district court's concept of "impact on shareholders"[43] as justification for allowing jurisdiction in Texas smacks of the improper "center of gravity" reasoning which this Court has rejected. Recently, this Court offered new guidance and placed some restraints upon certain excesses in assertion of personal jurisdiction over non-resident defendants in *Shaffer v. Heitner*, 433 U.S. 186 (1977). The Court admonished:

> [I]f the defendant consented to the jurisdiction of the state courts or was personally served within the State, a judgment could affect his interest in property outside the State. But any attempt "directly" to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of State's power.[44]

Applying the *Shaffer* rationale, it appears manifest that the courts below sanctioned the very type of assertion of extraterritorial jurisdiction which that case proscribes. The Idaho officials were neither served in Texas, nor did they consent to jurisdiction of courts in Texas; the effect of the holdings below is, in essence, to affect the property right of elected and appointed officials to exercise their statutory obligation to enforce Idaho law. Perhaps "property right" is an unusual concept to apply to that which

[42] 357 U.S. at 254. This basic principle was recently reiterated in *Shaffer v. Heitner*, 433 U.S. 186, 215 (1977).

[43] 577 F.2d at 1270 (J.S. App. A-23).

[44] 433 U.S. at 197.

a state official deals with when acting in an official capacity to enforce a state law—yet, under whatever "label" applied, a state and its officials do have some right in the laws of their state and their ability and obligation to apply therein such laws. The right affected is no less a right than that over property considered in *Shaffer*—and the purported assertion of extraterritorial jurisdiction by the court in Texas over the use of Idaho law is no less offensive.

It is conceivable that the district court below was initially concerned with a notion of judicial economy in deeming it proper for the Idaho, Maryland, and New York officials to come to Texas and defend in a single action, rather than have GWU be forced to bring individual suits in each state. If this were an unarticulated goal, it had a fatal flaw as far as Idaho was concerned. Though GWU did name as defendants Idaho Attorney General Kidwell and Director of the Idaho Department of Finance McEldowney, there remained in Idaho yet another official—the Ada County Prosecuting Attorney[45]—who had the same authority upon reference by Director McEldowney to seek injunctive relief against GWU as did Attorney General Kidwell.

Implications of the "practical effects" or "consequences" tests for jurisdiction over the non-resident Idaho officials are staggering. The clash with ordinary notions of due process and fundamental fairness are obvious enough when private citizens are involved, but the application of such rationale to state officials performing governmental duties in their "home" states—particularly as applied to officials subjected to personal jurisdiction merely because they were

[45] IDAHO CODE § 30-1509 (Supp. 1978).

charged with some duty which they had taken no steps to implement—casts a pall over attempts to enforce state laws generally. Extension of the rationale could be employed in a host of situations to disrupt state governmental activities and well-settled litigation procedure. For example, California officials who applied that state's air quality laws—which impose a higher emission standard than applicable federal law—to automobiles coming into California from any source could be required to appear in federal court in Michigan to defend there a constitutional challenge to the validity of the California laws in an action brought by a Michigan auto manufacturer. Grounds for assertion of Michigan jurisdiction would be that the California laws had a "practical, extra-territorial, effect" or "consequences" in Michigan, or "amounted to the regulation" of the auto manufacturer's Michigan-based business activities.

That states are entitled to have laws with an extraterritorial effect has long been settled in domestic relations law involving actions over the status of marriage under circumstances where personal jurisdiction over one of the parties was lacking (and, thus, property rights could not be adjudicated in the forum state). Even state laws regulating corporate securities in a more traditional sense have practical, extraterritorial, effects and consequences affecting shareholder rights and opportunities regardless of where those shareholders live. For example, Delaware's general corporation law has an effect upon all shareholders of all Delaware corporations wherever those shareholders live. The Delaware law determines when, and the extent to which, shareholders have appraisal rights in connection

with certain corporate transactions; it controls the conditions under which a Delaware corporation can use assets to repurchase its own shares from holders living anywhere in the world; it regulates the ability of residents of Texas, California, or any other state to vote cumulatively the shares they own in a Delaware corporation; and it generally limits the rights of shareholders anywhere to approve various types of corporate transactions. Shareholders voluntarily decide to purchase shares in a Delaware corporation, much like GWU voluntarily decided to propose a partial tender offer for shares of a corporation whose principal activities were in Idaho and, thus, known to be subject to the jurisdiction of the Idaho Corporate Take-Over Law. Could it conceivably be argued that the Delaware corporation's shareholder living in Texas could successfully entertain a lawsuit in federal court in Texas to challenge the constitutionality of the Delaware corporation laws on the ground that the law affected him in Texas. The answer must be in the negative, just as it must be in the case of the litigation brought by GWU herein.

In dismissing Washington state official defendants from an action brought in the District of Idaho because its forum lacked personal jurisdiction over individual members of an autonomous state agency when they "were never present in Idaho; rather their activities occurred in Washington and had an alleged effect in Idaho,"[46] the court noted that it was "doubtful that the individual members * * * could reasonably have anticipated that their activity in Washington could subject them to personal jurisdiction in a distant

[46]Idaho Potato Comm'n v. Washington Potato Comm'n, 410 F.Supp. 171, 182 (D. Idaho 1976).

state."[47] The analogy to the present case against Idaho officials and an alleged effect in Texas is obvious, and the conclusion of the Idaho federal court should be applied herein.

The 1977 Texas Supreme Court decision in *U-Anchor Advertising, Inc. v. Burt,* 553 S.W.2d 760 (Tex. 1977), *cert. denied,* 98 S.Ct. 1235 (1978), gives further credence to the claim that no personal jurisdiction is available under the Texas long arm statute over the Idaho officials. The facts bearing on personal jurisdiction were carefully weighed by the court in reaching its conclusion that due process standards would be violated if long arm jurisdiction were to be exercised over the out-of-state defendant. U-Anchor, a Texas corporation, caused Burt, an Oklahoma resident, to be served with process—as were the *Kidwell* defendants—through substituted service on the Texas Secretary of State. Burt entered a special appearance to challenge jurisdiction. Involved was a dispute over a written contract executed by the parties in Oklahoma, after solicitation there of Burt by a U-Anchor salesman, for placement of advertising displays at several locations along Oklahoma highways. Burt was to pay monthly for the displays by mailing payments to U-Anchor in Texas. The displays were constructed in Texas and erected by U-Anchor at the designated Oklahoma locations. There were no other contacts with Texas. U-Anchor brought suit after Burt had mailed 6 or 7 monthly payment cheques to them. The relevant portion of the long arm statute alleged to apply was that which specifically provided that "doing business" in Texas included the act of "entering into contracts * * * with a resident of Texas to be performed in whole or in part by either party in the State."[48] After an exacting review of constitutional standards, and particularly *Shaffer v. Heitner,* the court concluded that Burt's contacts with Texas were so minimal and fortuitous that he could not be said to have purposefully conducted business activities in Texas, and was merely a passive customer of a Texas corporation who never sought, initiated, nor profited from his single fortuitous contact with Texas.[49] Further considering jurisdiction on federal due process grounds, the court concluded that traditional notions of fair play and substantial justice would be offended by allowing long arm jurisdiction over Burt, concluding that, while the case may have been within the literal dictates of the Texas long arm statute, the due process clause of the Fourteenth Amendment forbade Texas courts from exercising personal jurisdiction over him. The court made the cogent observations that "[n]arrow factual distinctions will often suffice to swing the due process pendulum" and that "important constitutional questions prove immune to solution by checklist."[50]

The *U-Anchor* analysis of both purposeful business activities and federal due process standards is most apropos to this instant case. The out-of-state officials had minimal and fortuitous contacts with Texas, occasioned solely as a result of activity outside of Texas by GWU. These officials were passive recipients of inquiry and voluntary filing by GWU who never sought, initiated, nor profited from their

[47] *Id.* at 180.

[48] Tex. Rev. Civ. Stat. Ann. art. 2031b, § 4 (Vernon).

[49] 553 S.W.2d at 763.

[50] *Id.* at 764.

single fortuitous contact with Texas. The suit against them should not have been entertained by a federal court in Texas.

In every instance where use of a foreign forum has been authorized by the courts, jurisdiction was directed at defendants who were engaged in commercial, profit-oriented enterprise. Recently, in *Kulko v. Superior Court* 436 U.S. 84 (1978), this Court recognized that the absence of "commercial transactions in interstate commerce" wherein a defendant "sought a commercial benefit" precluded an analogy to commercial activity cases as a basis for assertion of personal jurisdiction.[51] In *Kulko,* this Court further concluded that a court's reliance on a defendant "having caused an 'effect' in [the forum state] was misplaced"[52] because the defendant derived no benefit from any activities relating to the forum. These *Kulko* conclusions fit the facts of this action like a glove. In the first instance, the Idaho officials were not engaged in commercial transactions in interstate commerce wherein they sought a commercial benefit by acting in a governmental capacity regarding Idaho law. Since there is no benefit at all to the Idaho defendants from activities relating to Texas, any jurisdiction based upon their having caused an "effect" in Texas is likewise misplaced. Though it might be argued that the State of Idaho itself—as a sovereign state, subject to Eleventh Amendment protections—derived a benefit from any "effects" in Texas generated by the action (inaction) of Idaho officials regarding Idaho law, such a

[51]436 U.S. at 97, 101 (1978).
[52]*Id.* at 96.

benefit does not run to those officials in their individual capacity, stripped of their sovereign immunity cloak. GWU cannot have it both ways under the *Young* doctrine.

B. Enforcement by an Idaho Official of State Law Which Allegedly Conflicts With a Portion of the Securities Exchange Act of 1934 Does Not Constitute a "Violation" of Said Act for Purposes of Federal Court Jurisdiction Thereunder When No Specific Proscription Thereof has Been Breached.

A primary element of the case against the out-of-state officials involved herein was GWU's allegation that section 27 of the Securities Exchange Act of 1934[53] served not only as a grant of subject matter jurisdiction but also as a grant of personal jurisdiction and venue. Thus, an action would lie under section 27 *only if* all three requirements —personal and subject matter jurisdiction and venue— were met.

1. Subject Matter Jurisdiction Under Section 27 of the Securities Exchange Act of 1934 is Lacking.

Before wandering off in the forest of federal law regulating securities transactions it is well to pay heed to this Court's recognition that entities which give rise to securities and the resulting securities market—corporations—"are creatures of state law."[54] The Court also recognized that when corporate investors commit their money to a corporation and its officers and directors they do so with the understanding that most of the activities of the cor-

[53]15 U.S.C. § 78aa (1970).
[54]Cort v. Ash, 422 U.S. 66, 84 (1975); Santa Fe Indus. Inc. v. Green, 430 U.S. 462, 479 (1977).

poration and those who chart its course will be governed by state, not federal, law.[55] There is no such thing as a federal law of corporations notwithstanding the fact that, because of the interstate commerce features of many securities transactions, there is substantial federal regulation of corporate securities transactions in a general scheme of state regulation. That there is no judicial desire to federalize that portion of corporate law dealing with securities transactions is evident from this Court's recent decision in *Santa Fe Indus., Inc. v. Green,* 430 U.S. 462, 469 (1977). The securities industry represents the inevitable growth of those corporations which create securities, and Congress has seen fit to regulate a part of that industry while recognizing, in the only regulatory scheme germane to this lawsuit, the legitimacy of nonconflicting state laws concerning securities activities.[56]

In the context of the litigation herein, the defendant state officials are not "participants in" the regulated securities field—thus subject to the obligations required of such participants—but are themselves *regulators* of that industry, acting in concert with the federal regulators thereof. What the state corporate takeover laws challenged by GWU attempt to achieve in the field of cash tender offers is provision of additional protective measures for shareholders beyond the minimal standards offered by federal law governing takeover bids against target companies chartered in or with substantial assets, primary offices, and activities in the state asserting jurisdiction.

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[55] *Id.*

[56] Section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a) (1970).

In 1968 there was engrafted onto the already existing Securities Exchange Act of 1934 the Williams Act amendments which provided for minimal informational disclosure and registration for cash tender offers affecting a 10% or greater portion of the outstanding shares of a company, the control of which was sought by another.[57] As is developed at considerable length below in discussion of the issues of federal preemption and undue burden on interstate commerce, the Williams Act and its legislative history demonstrates no express or implied congressional intent that federal law be the sole source of regulation of cash tender offers.

The Williams Act regulates tender offers in three ways. First, there is a disclosure requirement which requires takeover bidders (tender offerors or raiding companies) to file a statement with the federal Securities and Exchange Commission (hereafter SEC) indicating, among other things, the background and identity of the offeror, the source and amount of funds to be used in making the tender offer, and the offeror's plans with respect to the target company.[58] There are no provisions for automatic review of the sufficiency of these disclosures nor for comment thereon by the SEC. Second, there are specific benefits for target company shareholders who elect to tender their shares, including the following: *(i)* shareholders who elect

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[57] Public Law 90-439; Act of July 29, 1968, 82 STAT. 454. Codified at sections 13(d, e) and 14 (d-f) of the 1934 Act, 15 U.S.C. §§ 78m(d, e) & 78n(d-f) (1970). Though the Williams Act as originally passed was triggered only after 10% or more shares were acquired, 1970 amendments lowered the threshold to 5%.

[58] Section 14(d)(1) of the 1934 Act, 15 U.S.C. § 78n(d)(1) (1970).

to tender may exercise a right to withdraw their shares during the first seven days of the tender offer and at any time sixty days from the commencement of the offer;[59] *(ii)* where the tender offer is for less than all the outstanding corporate shares, and more than the requested number of shares are tendered, the tendered shares are to be taken up pro rata by the offeror during the first ten days of the offer;[60] and *(iii)* if, during the course of the offer, the amount tendered for shares is increased, all tendering shareholders are to receive the additional compensation, even if they tendered their shares before the price increase was announced.[61] Third, the Williams Act contains a broad anti-fraud provision, which makes untrue statements or omissions of material fact, and engaging in fraudulent, deceptive, or manipulative acts or practices regarding reporting, inviting tenders, or solicitation of securities holders unlawful.[62] Though the purpose, objectives, and legislative history of the Williams Act was recently exactingly analyzed by this Court in *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), nowhere is there indicated an intent to displace state regulation of tender offers, notwithstanding the fact that Virginia had a state corporate takeover law prior to the Williams Act's initial passage, and Ohio and Nevada added takeover laws before the Williams Act was amended in 1970.

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[59]Section 14(d)(5) of the 1934 Act, 15 U.S.C. § 78n(d)(5) (1970).

[60]Section 14(d)(6) of the 1934 Act, 15 U.S.C. § 78n(d)(6) (1970).

[61]Section 14(d)(7) of the 1934 Act, 15 U.S.C. § 78n(d)(7) (1970).

[62]Section 14(e) of the 1934 Act, 15 U.S.C. § 78n(e) (1970).

It is clear, too, from numerous judicial interpretations of the underlying provisions of the Securities Exchange Act of 1934 and its legislative history that its overall purpose was to prevent and punish fraud in the trading and sale of securities.[63] The entire Act is aimed at stock manipulators—not state officials who are themselves attempting to regulate.

The jurisdictional section of the Securities Exchange Act of 1934, section 27,[64] provides that United States district courts shall have exclusive jurisdiction of: *(i)* violations of the Act, and *(ii)* all suits in equity and actions at law brought to enforce any liability or duty created by the Act. The theory advanced by GWU and accepted by the courts below is that the various state official defendants have "violated" the Act because the state laws they are charged with enforcing constitute the type of "conflict"

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[63]*See, e.g.* Hooper v. Mountain States Securities Corp., 282 F.2d 195, 205 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961) ("the statute was designed to put an end to frauds in the sale and trading of securities").

[64]15 U.S.C. § 78aa (1970):

> The district courts of the United States, * * * shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. * * *

with the Act which section 28(a)[65] does not allow state laws to create. Under this theory, a "conflict" between state and federal law, should one exist, is tantamount to the breach of an affirmative duty and a "violation" of the Act subject to court action under section 27. The grave flaw in the premise supporting this syllogism is that no affirmative duty is anywhere placed by the Act upon states or their officials which *can* be "violated." Even if a section 28(a) "conflict" did exist between state and federal law, such conflict is in no terms made illegal or a "violation" by any provision of the Act. All section 28(a) provides is that state regulation which *does not* "conflict" *is permitted.* Though it is possible to understand how an Idaho or other state law might be a nullity and unenforceable under section 28(a) if conflict with the federal law is found, it is not possible to imagine how such an occurrence could ever rise to the level of a "violation" of the Act. The problem which the courts below failed to come to grips with is that section 28(a), on its face or by implication, prohibits no conduct, nor does it prescribe acceptable conduct. None of the language of the 1934 Act or its amendments which does impose affirmative obligations—the failure of which to perform would constitute a "violation" of the Act—and is accompanied by mandatory words, such as "shall," is in evidence in section 28(a). Yet, this section provides the sole basis upon which GWU's claim of a "violation" of the Act rests. Moreover, there is not a single case decided

[65] 15 U.S.C. § 78bb(a)(1970):

(a) * * * Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

under section 28(a) in which there has ever been found a "violation" of the Securities Exchange Act of 1934 or its amendments because of enactment or enforcement of a state law with an alleged "conflict."[66]

Pursuit of the argument that enforcement of a conflicting state law constitutes a "violation" of the Act for section 27 purposes would lead to the inevitable conclusion that state officials who acted to enforce a conflicting state law would be deemed "willful violators" of the Act and subject to fine or imprisonment under section 32(a) thereof.[67] This same reasoning would lead to the conclusion that a federal official who acted ultra vires in enforcing portions of the 1934 Act would also be deemed to have "violated" the Act, and subject to fine or imprisonment. Clearly, the intent of section 28(a) is *permissive* rather than forbidding. Subject matter jurisdiction under section 27 is simply lacking.

2. Personal Jurisdiction Over the Idaho Officials Under Section 27 of the Securities Exchange Act of 1934 is Lacking.

Assuming arguendo that the initial inquiry into the requirement of subject matter jurisdiction under section 27 has been satisfied, it remains inconceivable that personal jurisdiction thereunder could be asserted over the defend-

[66] It is not clear from case law what the term "conflict" means in this context. The SEC has interpreted "conflict" narrowly as comprehending only state regulation making *impossible* a compliance with federal law. *See, e.g.* SEC Investment Advisers Act Release No. 40 (Feb. 5, 1945), in 3 CCH FED. SEC. L. REP. ¶¶ 56,374-77, at 44,077-79; *id.* No. 8 (Dec. 12, 1940), in 3 CCH FED. SEC. L. REP. ¶¶ 56,420-21, at 44,086.

[67] 15 U.S.C. § 78ff(a) (1970), which provides that willful violators of the Act are subject, upon conviction, to be fined up to $10,000 or imprisoned for not more than five years.

ant out-of-state officials. The due process and fundamental fairness limitations applicable to the defendants, previously discussed above regarding the Texas long arm statute, are equally applicable to personal jurisdiction inquiry under section 27 of the Securities Exchange Act of 1934. In addressing this issue, the courts below did not rely upon any contacts peculiar to Texas in supporting findings of personal jurisdiction under section 27, but, instead, again employed the "practical, extraterritorial, effect" and "consequences" rationales which resulted in upholding personal jurisdiction. The fault with such a conclusion lies in the fact that section 27 merely relates to the place where a violation occurs, not to the place where some adverse consequences or effects occur.[68] This extraterritoriality argument is tantamount to alleging that the so-called "violation" is a tort and that section 27 has the same effect as the Civil Rights Act of 1871 and its companion jurisdictional statute.[69] Yet, as discussed above concerning the Texas long arm statute, it was nowhere shown that the Idaho officials took any action whereby they could fairly be said to have purposefully availed themselves of action in Texas which might invoke the "benefits and protections of its laws."[70]

Further, as earlier noted, only one of the two Idaho official defendants took any action whatsoever; Idaho

[68] *See, e.g.* Kulko v. Superior Court, 436 U.S. 84, 96-97, 101 (1978).

[69] 42 U.S.C. § 1983 (1970), and its jurisdictional counterpart, 28 U.S.C. § 1343(3) (1970).

[70] Hanson v. Denckla, 357 U.S. 235, 253 (1958); Shaffer v. Heitner, 433 U.S. 186, 216 (1977); Kulko v. Superior Court, 436 U.S. 84, 94, 101 (1978).

Attorney General Kidwell took no action, thus availed himself of no laws—not even Idaho's. The courts below wrongly asserted personal jurisdiction over the Idaho officials under section 27.

III

VENUE IS IMPROPERLY BASED IN TEXAS IN AN ACTION BROUGHT IN TEXAS BY A TEXAS RESIDENT AGAINST IDAHO OFFICIALS TO INVALIDATE AN IDAHO LAW ALLEGED INVALID ON THE GROUNDS IT IS PREEMPTED BY THE SECURITIES EXCHANGE ACT OF 1934 OR UNDULY BURDENS COMMERCE

A. Under the Jurisdiction and Venue Section of the Securities Exchange Act of 1934 a "Violation" Did Not Occur in Texas So As to Sustain Venue in That Judicial District

Section 27 of the Securities Exchange Act of 1934 contains a built-in venue provision keyed, as personal jurisdiction, to the notion of a "violation" of the Act. The courts below "found" venue on the theory that Idaho enforcement of the Idaho Corporate Take-Over Law "violated" the 1934 Act and that, as a result of "effects" or "consequences" in Texas, the violation "occurred" in Texas for venue purposes. The district court, in supporting its venue finding, cited but one case, *British-American Ins. Co. Ltd. v. Lee,* 403 F.Supp. 31 (D. Del. 1975), which involved insider trading in a normal securities action, is wholly inapposite to the facts of this instant case, and concluded that venue

was improper in the district in which the action was brought.[71]

Though section 27 has existed for 45 years there is not a single reported case under it in which its venue provisions have been applied to a state official under any circumstances, nor have the Act's venue provisions ever been applied to federal officials alleged to be acting illegally in administering the Act of which section 27 is a part.

The circuit court's reliance upon *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515 (8th Cir. 1973) is likewise misplaced. In that case, a claim was alleged under § 10(b) of the 1934 Act and Rule 10b-5 as a result of misrepresentations allegedly made in a tender offer to a Canadian corporation for shares of another Canadian corporation. The defendant corporation *deliberately* mailed into the United States to target company shareholders letters and other materials containing deliberate misrepresentations and inducements which caused the plaintiffs to suffer losses. The court cited at least eight "contacts" with the U.S. plaintiffs by the Canadian defendant and noted:

[71]In the cited case, the defendants were a non-resident corporate president and his wife, both sued by the corporation and charged with personal wrongdoing in connection with corporate assets. The court concluded that there were insufficient contacts between the defendants and Delaware on which to base venue in federal court in that State. The court concluded that the defendant husband's visits to Delaware did not constitute an " 'integral part of' or 'of material importance to' or even a substantial step in perpetrating the * * * alleged violations of the 1934 Act." (403 F.Supp. at 35.) While the court recognized that the foreign activities of the defendants had an "impact" on the value of shares of plaintiff's stock held by a trust company in Delaware, it could not place venue in Delaware because "no direct act constituting a violation of the 1934 Act occurred in" the District of Delaware. 403 F.Supp. at 35-36.

> The incidents were essential elements in a slowly unfolding scheme to defraud the plaintiffs involving the use of the mails and instrumentalities of interstate commerce. Jurisdiction is not lost because some of the significant steps in the fraudulent scheme took place in Canada. [Citations omitted.] Here, as in *Leasco*, the scales are tipped in favor of applicability because misrepresentations were made in the United States.[72]

The court concluded that the fact that the defrauded party had initiated the communication would not defeat jurisdiction and venue based upon use of an instrumentality of interstate commerce to communicate deliberate misrepresentations from Canada to the United States.[73] A fundamental element in commission of the tort of fraud in *Travis* was the deliberate act of sending from Canada into the United States information known to be wrong with the intent that it be detrimentally acted upon in the U.S. Analogy to the facts of this instant case is not apt. Here, GWU initiated contact with Idaho in an effort voluntarily to comply with Idaho law. There was nothing "fraudulent" about any matters in the course of dealings between GWU and Idaho which came to rest in any state. The circuit court below made much issue over transmission of Baptie's comment letter outlining objections to the GWU disclosure from Idaho to Texas by a medium of interstate commerce.[74] It is difficult to give much credence to use of this rationale as the premise for finding venue in Texas since the same "effect" or "consequence" in Texas would have been felt

[72]473 F.2d at 526 (*citing* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2nd Cir. 1972), which also involved a § 10(b) violation).

[73]*Id.* at 527.

[74]577 F.2d at 1272 (J.S. App. A-29).

by GWU even if Idaho had required GWU officials to come to Idaho to receive any comments on their filing, rather than transmitting the comments and order delaying the tender offer by an instrumentality of interstate commerce. The venue problem goes to the question of where "the act or transaction constituting the violation occurred,"[75] not where "effects" or "consequences" of any such act or transaction occurred. If the "violation" can be said to be enforcement of the Idaho law, then the act or transaction of violating section 27 can only have occurred in Idaho where all complained-of actions originated. Though Idaho action was delivered into Texas causing a consequence there, the action was complete when taken in Idaho and only "occurred" in Idaho. As this Court has held:

> The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of overriding policy, is to be given a "liberal" construction.[76]

It was clearly wrong herein to allow a "liberal" manufacture of venue under portions of federal law not applicable to state officials or the facts of this case and a theory of the place of occurrence which defies logic.

B. Under the General Federal Venue Law the Claim Against the Idaho Officials Arose in Idaho, not Texas

The applicable federal venue statute provides:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought in the judicial district where all the defendants reside, or

[75]Section 28(a), 15 U.S.C. § 78bb(a) (1970).

[76]Olberding v. Illinois Cent. R.R. Co., 346 U.S. 338, 340 (1953) (reversing for improper venue a judgment following a trial on the merits).

> in which the claim arose, except as otherwise provided by law."[77]

As the circuit court properly noted, a claim may arise, as a matter of law, in only one judicial district.[78] The problem, thus, becomes that of determining where "the claim arose." Though the circuit court opined that the single place where the restraint of the Idaho order delaying the effective date of GWU's tender offer occurred was Dallas, this reasoning seems predicated on the fact that GWU was restrained from making an offer "to Sunshine shareholders who reside in districts throughout the country."[79] If GWU had been restrained from making its tender offer solely to Idaho shareholders would the same logic apply. The fault in the result reached is application of the "effects" or "consequences" test, utilized by the courts in assessing personal jurisdiction issues, to the more narrow concept of venue.

There are, however, special venue considerations which apply to situations where state officials are sued based on rules or actions instituted in the course of their official duties at their official residence. In such circumstances, the claim arises *solely* in the judicial district in which the official actions and duties were performed--in this case, the District of Idaho.[80] Applying a "weight of contacts" test

[77]28 U.S.C. § 1391(b) (1970).

[78]577 F.2d at 1273 (J.S. App. A-30) (*citing* C. Wright, A. Miller & F. Cooper, Federal Practice and Procedure, *Jurisdiction* § 3806 at 28-29 (1976)).

[79]577 F.2d at 1273 (J.S. App. A-31).

[80]*See* O'Neill v. Battisti, 472 F.2d 789 (6th Cir. 1972), *cert. denied sub nom.*, Heitzler v. O'Neill, 411 U.S. 964 (1973); Weil v. New York State Dep't of Trans., 400 F.Supp. 1364 (S.D. N.Y. 1975); United Dairy Farmers Co-op v. Milk Control Comm'n, 47 F.R.D. 1 (W.D. Pa. 1968), *transferred*, 335 F.Supp. 1008 (M.D. Pa. 1971), *aff'd*, 404 U.S. 930 (1971).

similar to that employed by the circuit court herein, a New York federal court reasoned:

> [C]ourts have used the "weight of contacts" test to determine proper venue. In the case at bar the clear weight of the contacts is in Albany, which is located in the Northern District of New York. There the determination was made as to the number and identity of those to be laid off. If there was any violation of the plaintiff's rights it occurred there. Moreover, that is the situs where defendants perform their official duties.[81]

Though the effect on the plaintiff herein was felt in Texas, the acts by the Idaho defendants all occurred in Idaho, and Idaho is the district in which the defendants perform their official duties. Since venue is a defendant's right, a contacts test should relate to a defendant's contacts with the judicial district in which suit is brought, not the district of a plaintiff's alleged misery.[82] As a Pennsylvania federal court has held:

> The defendants are being sued in their official capacity as officers of the Commonwealth of Pennsylvania. As such, their official residence is in the State Capitol, Harrisburg, in the Middle District of Pennsylvania and venue of the action is properly laid in that District.[83]

[81]Weil v. New York State Dep't of Trans., 400 F.Supp. 1364, 1365 (S.D. N.Y. 1975).

[82]*See e.g.* Honda Associates, Inc. v. Nozawa Trading, Inc., 374 F.Supp. 886, 889-92 (S.D. N.Y. 1974). *See also* C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, *Jurisdiction* § 3806 at 35 (1976). The "weight of contacts" test there described has applied solely in the context of antitrust cases.

[83]United Dairy Farmers Co-op v. Milk Control Comm'n, 47 F.R.D. 1, 3 (W.D. Pa. 1968), *transferred*, 335 F.Supp. 1008 (M.D. Pa. 1971), *aff'd*, 404 U.S. 930 (1971).

The same logic applies herein; the same conclusion should be reached. Venue of the action is only proper in the District of Idaho.

It further appears that the circuit court was guided in its venue conclusion by thoughts of judicial economy, noting that if Maryland and New York officials had, like Idaho, asserted jurisdiction "there would have been no district where all the defendants resided."[84] The obvious response is that GWU should have been required in the first instance to bring separate actions in the Districts of Idaho, Maryland, and New York. Though judicial economy may be an appealing concept to those on the bench of already overburdened federal courts, it is not a form of relief that Congress has provided for other than through Multidistrict Litigation means. Moreover, such reasoning overlooks the fact that yet another Idaho official who had jurisdiction to enforce the Idaho Corporate Take-Over Law through court action seeking injunctive relief remained safely in Idaho, unnamed in this instant action.[85] Thus, to obtain complete relief, GWU would have had to bring yet another action, in the District of Idaho, to achieve its goal of enjoining all Idaho officials with jurisdiction to halt their proposed tender offer.

The only proper federal judicial district in which venue lay in this action was the District of Idaho.

[84]577 F.2d at 1273 (J.S. App. A-31).

[85]IDAHO CODE § 30-1509 (Supp. 1978) (the Ada County Prosecuting Attorney).

IV

THE IDAHO CORPORATE TAKE-OVER LAW IS NOT PREEMPTED BY THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION[86]

A. Though Congress Reserved to the States Under Section 28(a) of the Securities Exchange Act of 1934 the Power to Regulate Corporate Takeover Offers in a Manner Which Differs From That Adopted in the Williams Act, States Have an Inherent Power to Accomplish Such Regulation.

Relations between state and federal governments have historically been typified by a notion of cooperative federalism in which the units are regarded as "mutually complementary parts of a single governmental mechanism all of whose powers are intended to realize the current purposes of government according to their applicability to the problem in hand."[87] Indeed, the more recent trend of this Court has been a careful approach to maintaining the diversity between state and federal regulation wherever possible, as will be developed below. This Court has ruled that federal preemption occurs whenever a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[88] However, as a prerequisite to preemption analysis it is necessary to ascertain a congressional intent to preemptively occupy the

[86]U.S. CONST. art. vi, cl. 2.

[87]Wright, *The Advisory Commission on Intergovernmental Relations: Unique Features and Policy Orientation*, 25 PUB. AD. REV. 193, 199-200 n. 26 (1965).

[88]Hines v. Davidowitz, 312 U.S. 52, 67 (1941). It was this rationale that most attracted the district and circuit courts herein in finding preemption. (J.S. App. A-35, A-113.)

field or the existence of a true and irreconcilable conflict between state and federal law.[89] As stated by this Court:

> The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.[90]

Addressing initially the concept of occupation of the field by congressional action, it is clear that occupation will *not* be found unless there is demonstrated a "clear and manifest purpose of Congress" that the subject matter be exclusively federally regulated.[91] Congressional preemptive purpose may be evidenced in several ways:[92]

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. [Citations omitted.] Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. [Citation omitted.] Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. [Citations omitted.] Or the state policy may produce a result inconsistent with the objective of a federal statute. [Citation omitted.]

[89]Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 141 (1963).

[90]*Id.* (*citing* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1959)).

[91]Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 146 (1963) (*citing* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[92]Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

Clearly, the Williams Act amendments to the Securities Exchange Act of 1934 do not constitute a "pervasive" scheme to regulate tender offers inasmuch as the law merely mandates the timing and content of disclosure.[93] Federal dominance can hardly be seriously contended due to the engrafting of the Williams Act onto the schema of the Securities Exchange Act of 1934 with its specific recognition, in Section 28(a) thereof,[94] of the right of nonconflicting state regulation,[95] as well as this Court's long standing recognition of the propriety and constitutionality of the coexistence of federal and state securities regulation.[96]

The object of the Williams Act is clearly and exclusively shareholder protection through disclosure so that informed tenders may be made,[97] yet federal requirements are minimal rather than all encompassing. Some contend that state corporate takeover laws are inimical to the purposes of the Williams Act based upon the fact that the Senate Report of congressional purpose indicates "extreme care to avoid

[93]Wilner & Landy, *The Tender Trap: State Takeover Statutes and their Constitutionality*, 45 FORDHAM L. REV. 1, 29 (1976); Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency*, 62 CORNELL L. REV. 213, 214 (1977).

[94]15 U.S.C. § 78bb(a) (1970).

[95]For purposes of determining what constitutes a "conflict" in a section 28(a) context it is well to note that the SEC has interpreted the term narrowly as comprehending only state regulation making *impossible* a compliance with federal standards. *See, e.g.* SEC Investment Advisers Act Release No. 40 (Feb. 5, 1945), in 3 CCH FED. SEC. L. REP. ¶¶56,374-77, at 44,077-79; *id.* No. 8 (Dec. 12, 1940), in 3 CCH FED. SEC. L. REP. ¶¶ 56,420-21, at 44,086.

[96]Hall v. Geiger-Jones Co., 242 U.S. 539 (1917) (recognizing Ohio law); Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559 (1917) (South Dakota); Merrick v. N.W. Halsey & Co., 242 U.S. 568 (1917) (Michigan blue sky law).

[97]Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977); Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975).

tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid."[98] Their reasoning, however, implies that an object of the Williams Act was to sanctify the tender offer itself (and, arguably, because of the short time frame specified by the Williams Act, to sanctify the "Saturday night special") when, in fact, the Act's sole object was to "regulate tender offerors—not to confer new benefits upon them."[99] Those who have criticized state corporate takeover laws, because the delay time involved in them (as opposed to the short 7 to 10 day "Blitzkrieg" time periods allowed by the Williams Act) offers incumbent management of a target company additional opportunities to muster defenses to the takeover bid, reluctantly admit that the failure of the Williams Act to prevent the "Saturday night special" encourages panic selling and fails to provide an adequate time period during which target company management can honestly evaluate a tender offer and advise its shareholders.[100] There is, thus, no inconsistency between the state and

[98]SENATE COMM. ON BANKING AND CURRENCY, FULL DISCLOSURE OF CORPORATE EQUITY OWNERSHIP AND IN CORPORATE TAKEOVER BIDS, S. REP. No. 550, 90th Cong., 1st Sess. 3 (1967).

[99]Note, *The Constitutionality of State Takeover Statutes: A Response to Great Western*, 53 N.Y.U. L. REV., 872, 915 (1978). In *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 29 (1977), this Court noted:

> Congress was indeed committed to a policy of neutrality in contests for control, but its policy of evenhandedness does not go either to the purpose of the legislation or to whether a private cause of action is implicit in the statute. Neutrality is, rather, but one characteristic of legislation directed toward a different purpose—the protection of investors.

[100]E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 218 (1977). *See also* Robinson, *Tender Offers: Some Facts and Fancies, (Part 2)*, N.Y. L.J., May 18, 1976, at 1; Subcommittee on Proxy Solicitations and Tender Offers, Federal Regulation of Securities Committee, *State Takeover Statutes and the Williams Act*, 32 BUS. LAW. 187, 189 (1976).

federal laws inasmuch as both have as a primary purpose investor protection. Nor is the Williams Act identifiable with those comprehensive federal statutes designed to preempt such parallel state legislation as this Court criticized in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973).[101] The Idaho law is not preempted under this analysis.

In yet another form of preemption analysis, this Court has first construed the relevant state and federal statutes to determine whether a true conflict exists.[102] In the principal case relating to the conflict doctrine of preemption, *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446 (1960), a presumption of validity was applied to state statutes so as to leave vital state interests intact. Such a view is clearly supported by Alexander Hamilton's writings in *The Federalist*, where he states:

> It is not, however, a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of sovereignty,

[101]The Court held: "It is the pervasive nature of the scheme of federal regulation * * * that leads us to conclude that there is preemption." Nor do Williams Act concerns lead to a "concomitant decrease in safety" that caused this Court concern regarding local laws affecting airline schedules. *Id.* at 639. *See* Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 YALE L. J. 510, 519 n. 65 (1979); Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency*, 62 CORNELL L. REV. 213, 248 (1977).

[102]Perez v. Campbell, 402 U.S. 637, 644 (1971). "Conflict" encompasses such other terms as "interference," "repugnance," "irreconcilability," "inconsistency," and words of similar impact. Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515, 525.

> The necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power; and the rule that all authorities, of which the states are not explicitly divested in favor of the Union, remain with them in full vigor is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed Constitution.[103]

Though the decisions of this Court went through a period of time when one could argue that the state presumption had not only fallen into disrepute but had been replaced by a federal presumption,[104] recent cases reflect the more traditional solicitude of state interests in the Court's preemption inquiries. In *Goldstein v. California*, 412 U.S. 546 (1973), the Court emphatically protected the state's right to prohibit "pirated" recordings by narrowly construing the preemptive thrust of the Constitution's copyright clause. Utilizing Hamilton's concept of "constitutional repugnancy," the Court determined that exclusive federal power exists over "matters which are *necessarily* national in import."[105] Further—regarding "necessarily national" matters—those permissible situations where conflicts "may possibly arise" from concurrent state and federal regulation

[103]THE FEDERALIST, No. 32, at 200-01 (New American Lib. ed. 1961), *quoted in* Farmers Educ. & Cooperative Union of America v. WDAY, Inc., 360 U.S. 525, 546 (1951) (Frankfurter, J., dissenting).

[104]In *Perez v. Campbell*, 402 U.S. 637, 652 (1971), the Court specifically overruled *Kesler v. Dep't. of Public Safety*, 369 U.S. 153 (1962) (in which the Court had ruled that conflicts bearing on peripheral concerns of a federal scheme were allowable under the supremacy clause, applying a balancing test) and reaffirmed the rule of *Hines v. Davidowitz*, 312 U.S. 52 (1941), that the supremacy clause invalidates any frustration of a pervasive federal law's full effectiveness.

[105]412 U.S. at 554 [emphasis in original].

are to be distinguished from those situations mandating federal preemption in which such conflicts "will necessarily arise."[106] By articulating a strongly state directed standard for measuring repugnancy (requiring "necessarily national" character and "necessary" conflict) this Court has brought into the conflict area a test akin to that applied in specific intent to preempt cases.[107]

In *New York Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973), at issue was the alleged preemption of state work rules by a federal work incentive program relating to family aid under the Social Security Act. Though the state rules, implemented as part of a federal program, did not present the usual pattern of federal and state laws converging on a common subject, the Court relied upon the federal law's principle of cooperative federalism to build the state interest into a presumption against preemption,[108] noting:

> Where co-ordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal preemption becomes a less persuasive one.[109]

In *Dublino* the Court left no doubt about what was expected of Congress if federal preemption is intended:

> If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the

[106] *Id.*

[107] *See* Note, *The Presumption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 640-41 (1975).

[108] 413 U.S. at 414 n. 9.

[109] 413 U.S. at 421.

> exercise of the power of the state unless there is a clear manifestation of the intention to do so. The exercise of federal supremacy is not lightly to be presumed.[110]

Again, as in *Goldstein*, the *Dublino* test for occupation of the field is synonymous with a specific intent requirement. The rationale of *Goldstein* and *Dublino* suits well the setting herein where Congress failed to provide for specific preemption of state law when it deliberately engrafted the Williams Act onto the Securities Exchange Act of 1934 (with its specific Section 28(a) recognition of state right to pass nonconflicting securities laws). Had Congress intended the preemptive result urged by Appellee and found by the courts below, it would and should have provided for it. At the time the Williams Act was passed the State of Virginia already had a state corporate takeover law.[111] By the time Congress considered its amendments to the Williams Act two other states had enacted takeover laws,[112] yet

[110] 413 U.S. at 423-24. As one author notes:

> To preempt where Congress is silent and has not in terms covered the field creates a gap in needed regulation and leaves the state powerless to fill it. * * * [F]ederal supremacy, always protectable by Congress, should not—despite regulatory pervasiveness, potential or peripheral conflict—constrict the Court's ability to protect important state interests. *Ware* suggests a general perspective on federalism suitable here. Rather than to protect interests and check incursions into the various governmental domains, the better conception has the Court promoting cooperation among them wherever possible.

Note, *The Presumption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 654 (1975). *Referring to* Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117 (1973).

[111] VA. CODE §§ 13.1-528 to -541 (1978) (effective Mar. 5, 1968). The Williams Act became effective July 28, 1968.

[112] OHIO REV. CODE ANN. § 1707.041 (Page 1978) (effective Oct. 9, 1969); NEV. REV. STAT. § 78.376 to .3778 (1973) (effective Mar. 4, 1969).

Congress chose not to include preemptive language in its 1970 revisions. Though the state law/federal law issue has been much discussed in the tender offer field, both by writers and litigators, Congress has not acted to preempt the field, nor is it apparently likely to.[113] Further support for Appellants' contention that no preemption exists is this Court's statement in *Dublino* that the concept of pervasiveness typified by *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 318 (1947), is outmoded in the context of current Congressional practice:

> The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem • • •.[114]

[113]The American Bar Association's Subcommittee on Proxy Solicitations and Tender Offers of the Federal Regulation of Securities Committee noted in 1976:

> Although it was apparent that the majority [of the subcommittee] favored federal preemption of state laws governing tender offers, the meeting was advised by one congressional staff member that the mood of Congress makes federal legislation preempting the existing state takeover statutes extremely unlikely.

Subcommittee on Proxy Solicitations and Tender Offers of the Federal Regulation of Securities Committee, *State Takeover Statutes and the Williams Act*, 32 BUS. LAW. 187, 187 (1976). The Subcommittee noted that "there appears to be no directly relevant judicial authority supporting the claim that the state statutes are invalid. The attempt to draw support from allegedly analogous constitutional cases becomes both complex and strained." *Id.* at 191-92.

[114]413 U.S. at 415. *But cf.* City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 633 (1973) (where local law was held to be preempted by "the pervasive nature of the scheme of federal regulation"). However, unlike the Federal Aviation Agency regulations there in issue, the Williams Act merely offers minimum disclosure standards for conducting cash tender offers and is in no way so "comprehensive" or "pervasive" that stricter state rules are necessarily inconsistent with federal policy.

In recent analysis of the "conflict" issue, the Court has, again, compellingly weighted state interests. At issue in *Kewanee Oil Co. v. Bicron*, 416 U.S. 470 (1974), was whether state trade secret law was preempted by federal patent law. Though the Court was ostensibly concerned with the fact of whether a conflict existed, substantial support for the resulting finding of no conflict came from a state-oriented balancing of interests and consideration of the mutually compatible objectives of the state and federal laws.[115] In the only recent securities law preemption case, *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117 (1973), the challenged state law survived an *admitted* conflict. There, the Court allowed the state to refuse to enforce a compulsory arbitration clause in an employment contract required under a New York Stock Exchange rule flowing from administrative authority delegated to it by federal securities law. Though it might be argued that the Court's decision turned in part on the semi-private nature of the federally-adopted rule, the decision certainly evidences a perspective toward accommodation of state interests. The Court might have avoided finding a conflict by holding that the N.Y.S.E. rules were not federal law within the meaning of the supremacy clause; it relied instead on conventional preemption analysis and upheld the conflicting state law, expressing its:

> . . . conviction that the proper approach is to reconcile "the operation of both statutory schemes with one another rather than holding one completely ousted."[116]

[115]414 U.S. at 478-79.

[116]414 U.S. at 127, *quoting* Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963). *See also* the inference of cooperative pur-

Parallel state and federal regulation of subject matter in a context where more stringent state statutes were being applied was approved in *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963), wherein the Court noted that it had "sustained state statutes having objectives virtually identical to those of federal regulations,"[117] and held:

> The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.[118]

"Federal regulation by means of minimum standards" was not deemed per se indicative of preemption.[119] State regulation could stand so long as dual compliance was possible, no demonstrated need for national uniformity existed, and the state law dealt rationally with a legitimate state problem. The Idaho Corporate Take-Over Law in issue herein deals rationally with the legitimate state problem of protection of Idaho investors in corporations with a substantial nexus with Idaho who are required to make a sophisticated investment judgment whether to tender all or a part of their stock in the target corporation to the tender offeror. This usually does not involve a mere decision of whether or not to make an outright sale of securities—a relatively simple decision—but in a partial tender offer such as was involved herein, with the prospect of pro rata

pose gleaned from an expression of congressional intent not to preempt in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 332, 336 (1973).

[117]373 U.S. at 142 (citing cases).

[118]*Id.*

[119]373 U.S. at 145.

acceptance of shares tendered coupled with the decision to tender all or merely a portion of the shares owned, the shareholder will most likely remain an investor in the newly-structured corporation whose stock he owns. Though minimal disclosure, such is offered by the Williams Act, is better than no disclosure at all, the State of Idaho was within proper constitutional grounds under Supremacy Clause analysis in strengthening the disclosure provisions without facing preemption.

The circuit court below opined that *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), supported its contention that the Idaho law was preempted,[120] inasmuch as this Court had invalidated the challenged state law therein by applying the *Hines v. Davidowitz* standard regarding an obstacle to accomplishment and execution of full congressional purposes and objectives.[121] In *Jones*, however, congressional purpose and an express preemption provision[122] were clearly spelled out within the four corners of the federal regulatory scheme involved, unlike the situation herein where there is no express preemption and reference must be made to legislative history to determine the congressional purpose that is alleged to be frustrated.[123] Moreover, as the circuit court pointed out, state law was preempted by *Jones* only because "compliance with state law would automatically trigger federal enforcement action,"[124] yet there is no concomitant federal enforcement "triggered" by a compli-

[120]Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1275 n. 39 (5th Cir. 1978) (J.S. App. A-36).

[121]312 U.S. 52, 67 (1941).

[122]Jones v. Rath Packing Co., 430 U.S. 519, 530-32, 543 (1977).

[123]*See* Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977).

[124]577 F.2d 1256, 1275 n. 39 (5th Cir. 1978) (J.S. App. A-36).

ance with the Idaho Corporate Take-Over Law. Surely, any compliance with the Idaho law would presage a cash tender offer which would concurrently require compliance with the federal Williams Act and its disclosure provisions, but such hardly presents a similar situation to that considered by this Court in *Jones*. The circuit court, too, appears to subscribe to the posture taken by some writers that Section 28(a) allowing nonconflicting state laws in the securities field does not apply to state takeover statutes.[125] Such a posture not only ascribes to Congress an unwarranted ignorance of the effect of their engraftment of the Williams Act onto the existing Securities Exchange Act of 1934, but also ignores a basic tenet of statutory construction which requires consideration of an original act and its amendments as but a single law.[126] There is simply no indication that Congress intended to treat tender offers uniquely compared to other portions of the 1934 Act, thus the standard of cooperative federal-state relations is applicable.

The fundamental flaw in the premise of both the district court[127] and circuit court[128] is that the purpose of the Williams Act is to maintain a balance of neutrality between the tender offeror and target management. That the premise is wrong is clear both from analysis of the legislative history of the Williams Act and from this Court's

[125] *Id.*

[126] F. McCaffrey, Statutory Construction 164-67 (1953). *See* Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 Yale L. J. 510, 519 n. 63 (1979).

[127] 439 F.Supp. 420, 437 (N.D. Tex. 1977), *aff'd*, 577 F.2d 1256 (5th Cir. 1978) (J.S. App. A-118).

[128] 577 F.2d 1256, 1279 (5th Cir. 1978) (J.S. App. A-45).

conclusion in *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 29 (1977), that the sole congressional purpose was investor protection.[129] Senate testimony by Securities and Exchange Commission Chairman Cohen,[130] quoted and emphasized in *Piper*[131] as well as statements by Sen. Williams of congressional desire to "require full and fair disclosure for the benefit of investors"[132] underscores the conclusion that the Williams Act leaves the relative strength of raider and target unchanged rather than striking a "carefully conceived balance."[133] One recent author, writing about state takeover laws, notes:

> Although it is true that Senator Williams sought "to *avoid* tipping the scales either in favor of management or in favor of the person making the takeover bids," * * *, there is a crucial distinction between a desire to "avoid tipping the scales" and a deliberate attempt to establish a "neutral" balance between the competing parties.[134]

[129] *See also* Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975), in which this Court stated:

> [T]he purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualification and intentions of the offering party.

[130] *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 198 (1967) (testimony of SEC Chairman Cohen).

[131] 430 U.S. at 27-28.

[132] 113 Cong. Rec. 24,664 (1967) (remarks of Sen. Williams).

[133] Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Cas. W. Res. L. Rev. 722, 759-61 (1970).

[134] Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 Yale L. Rev. 510, 522 n. 81 (1979).

The author continues:

> If Congress did create a careful balance in 1968, it has quite willingly altered it on several occasions. In 1970, Congress reduced the level of stock ownership that triggers § 13d of the Williams Act from 10% to 5%. * * * This alerts management to a potential tender offer at an earlier point in time. The Antitrust Improvements Act, 15 U.S.C. § 18a (1976), has further shifted the balance in favor of management. * * * In addition, the new schedule 14D-1, adopted by the SEC in August, 1977, makes disclosure by offerors more detailed than it had been previously.[135]

Added to this is the most recent announcement by the SEC of proposed new rules to govern the conduct of tender offers under the Williams Act. On 5 February 1979, the SEC released for consideration Proposed Rules and Schedule,[136] as authorized by the Williams Act,[137] for regulating certain conduct relating to tender offers. The proposed rules would, inter alia:

> require all tender offers to remain open for at least 30 business days and for at least ten business days after any increase by the [takeover] bidder in the offered consideration; provide withdrawal rights for shares deposited by investors during the first fifteen business days of an offer and an additional 10 business days in the event of a competing offer; and permit bidders to extend pro rata acceptance rights for

[135] *Id.*

[136] Securities and Exchange Commission Release Nos. 33-6022; 34-15548; IC-10575; File No. S7-770 dated Feb. 5, 1979 (17 C.F.R. Part 240). [Hereafter SEC Proposed Rules of 5 Feb. 1979.]

[137] At sections 14(d) and 14(e) thereof. 15 U.S.C. §§ 78n(d) & 78n(e).

> periods in excess of those required by Section 14 (d)(6).[138]

What "balance" there may have been no longer exists in the federal law, thus reinforcing the conclusion that investor protection is the singular purpose of the Williams Act—a purpose that underlies the parallel Idaho Corporate Take-Over Law at issue herein.

[138] SEC Proposed Rules of 5 Feb. 1979, at 7. In discussing "Proposed Rule 14e-1(a) which would require that any tender offer must remain open for at least thirty days from the date it is first published, sent or given to security holders," *id.* at 111, the Commission identified several factors which led to its proposal. Among these was the factor that:

> The Williams Act was intended to "correct the current gap in our securities laws . . ." by providing full disclosure in tender offers. The substantive provisions of that Act were intended to permit a security holder provided with full disclosure to make an investment decision in an unpressured manner. However, certain tender offer practices have developed which increase the likelihood of hasty decision making by security holders confronted with a tender offer. The pejorative terms for these tender offers are well known—"Blitzkreig" and "Saturday Night Special." Tender offers of an excessively short duration increase the likelihood for hasty, ill-considered decision making and the possibility for fraudulent, deceptive or manipulative acts or practices by a bidder and others. The problems engendered by these tender offers of excessively short duration also may have provided part of the stimulus for some of the 36 states which have enacted anti-takeover [sic.] statutes since 1968. To the extent this was a purpose of such legislation, the attempt to alleviate the problem was laudable, but has resulted in an inconsistent, overlapping and ofter [sic.] counterproductive pattern of regulation and in many instances may have tipped the carefully construed [sic.] balance between bidder and subject company envisioned by the Williams Act in favor of subject company. Accordingly, the Commission believes that a uniformly applied federal regulation would better serve the purposes and policies of the Williams Act, including the interests of investors.

SEC Proposed Rules of 5 Feb. 1979 at 111-12. Thus, the SEC appears begrudgingly to concede that state corporate takeover laws have benefitted the tender offer field, acting as a laboratory to point up defects in federal law, but now hopes to eliminate the effect of these state laws by executive agency fiat rather than by seeking

There simply appears to be no congressional interest in exclusive regulation of cash tender offers. That area of concern seems to be no more prominent than those of traditional federal-state cooperation in other aspects of the securities market in general and the regulation of corporations. Though arguments such as a national marketplace concept, irrelevance of local conditions, and the *possibility* of conflicting or discriminatory local legislation[139] have been raised in support of national regulation of these fields,[140] they remain in the federal-state cooperative sphere. Nor does this Court appear willing (nor should it) to "federalize" corporate law in the securities field, for it announced in *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 479-80 (1977):

> Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden. [Citation omitted] * * * There may well be a need for uniform federal fiduciary standards to govern mergers such as that challenged in this complaint. But those standards should not be supplied by judicial extension of [federal law] to "cover the corporate universe."

State law *does* impose high fiduciary standards on corporate officers and directors,[141] and these apply in the takeover context. A New York state court has ruled that management conduct in obtaining a temporary restraining order against a hostile tender offer was a breach of fiduciary responsibilities which have traditionally been imposed by the states.[142] So, too, may Idaho indulge in the presumption that corporate officials subject to its jurisdiction will be faithful to their fiduciary responsibilities in a similar context. As will be developed below, there are numerous "traditional" means of delay or diversion which manage-

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express congressional action to preempt. The Idaho Appellants contend that there is more that the federal government can and should learn from the state law "laboratory" before any express preemption action is taken—which action is in the province of Congress, not the SEC.

[139]It is well settled law that this Court will not speculate on possibilities of hypothetical situations in its preemption analysis:

> In this as in other areas of coincident state and federal regulation, the "teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists."

Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 45 (1966); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 130 (1978).

[140]Nader, *The Case for Federal Chartering*, in CORPORATE POWER IN AMERICA 67, 79-84 (R. Nader & M. Green eds. 1973). *See also* Note, *The Constitutionality of State Takeover Statutes: A Response to* Great Western, 53 N.Y.U. L. REV. 872, 911 (1978).

A Colorado state law relating to inspection of shareholder lists (COLO. REV. STAT. § 3-15-17) was challenged as preempted by its incompatibility with SEC Rule 14a-7. In *Wood, Walker & Co. v. Evans*, 300 F.Supp. 171 (D. Colo. 1969), *aff'd*, 461 F.2d 852 (10th Cir. 1972), the courts held that the two provisions were not mutually exclusive, that utilization of the federal procedures did not constitute a binding election, and that the federal rule did not preempt the state statute.

[141]The high fiduciary duties have been recognized by federal courts as well, and such responsibilities are particularly applicable in the tender offer context, for as the United States Court of Appeals for the Second Circuit noted:

> Corporate officers and directors in their relations with shareholders owe a high fiduciary duty of honesty and fair dealing. [Citation omitted.] By reason of the special relationship between them, shareholders are likely to rely heavily upon the representations of corporate insiders when the shareholders find themselves in the midst of a battle for control.

Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341, 364 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973). *See also the cited case* Swanson v. American Consumer Industries, Inc., 415 F.2d 1326 (7th Cir. 1969).

[142]Reeves v. Texas Gulf, Inc., 78 Misc. 2d 579, 357 N.Y.S.2d 662 (Sup. Ct. 1974).

ment of a target company may invoke to resist a tender offeror. State takeover laws do not signal nor have they signaled the end of cash tender offers as a means for acquiring corporate control.[143]

V

THE IDAHO CORPORATE TAKE-OVER LAW DOES NOT CONSTITUTE AN UNDUE BURDEN ON INTERSTATE COMMERCE[144]

A. In an Area Where State and Federal Laws Traditionally Coexist, Federal Courts May Not Weigh the Benefits of a State Corporate Takeover Law Against Its Alleged Effect on Interstate Commerce

The Williams Act represents congressional action in the field of securities regulation where state and federal regulation has for many years existed side by side.[145] Not only are the rights of states to regulate in the securities area long established, but the states also appear to have been the first so to regulate.[146] State "blue sky" securities legis-

[143]There were more tender offers in 1976 (132 offers) and 1977 (181 offers) than in any year since 1956 (the first year for which data is available. The 313 tender offers during 1976 and 1977 exceeded the total number of tender offers (269 offers) in the prior six years from 1970 to 1975. Austin, *Study Reveals Trends in Tactics, Premiums, Success Rates in Offers*, N.Y.L.J., June 12, 1978 at 25, col. 5. Dr. Austin concludes that:

> The implication is clear: tender offers continue to be an increasingly popular form of corporate takeover vehicle, and increased defensive strategies on the part of target corporations have not abated the increasing popularity of this type of corporate takeover vehicle.

Id. at 39, col. 2. There has not yet been a comprehensive study of any "chilling effect" state statutes may have had on tender offers.

[144]U.S. Const. art I, § 8, cl. 3.

[145]I L. Loss, Securities Regulation 28 (2d ed. 1961).

[146]In three early cases this Court ruled that state securities regulation did not violate the Fourteenth Amendment or unduly burden

lation withstands constitutional challenge because it promotes a legitimate state interest in attempting to assure that a state's citizens are not subjected to fraudulent securities transactions.[147] Thus, courts, in assessing the validity of state takeover laws should begin inquiry with the presumption that the historic police power of the states has been exercised in a constitutionally permissible manner.[148] Only when courts find that Congress has made no determination regarding the appropriateness of any state regulation in a particular field are those courts justified in applying a balancing analysis of the competing state and federal interests. In *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945), this Court held that:

> Congress has undoubted power to redefine the distribution of power over interstate commerce. It may * * * permit the states to regulate the commerce in a manner which would otherwise not be permissible.

Thus, "Congress may break [its] silence and permit state police laws to operate even where they involve interstate commerce in a matter of national concern."[149] In the securities field, Congress broke its silence by enactment of

interstate commerce. Merrick v. N.W. Halsey & Co., 242 U.S. 568 (1917); Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559 (1917); Hall v. Geiger-Jones Co., 242 U.S. 539 (1917).

[147]Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Cas. W. Res. L. Rev. 722, 740 (1970).

[148]Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

It is improper for a court to act as a "super-legislature" by considering possible ulterior motives and weighing various interests assumed to be behind state laws:

> When the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of the courts, but for the legislative body, on which rests the duty and responsibility of decision.

South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 191 (1938).

[149]Biklé, *The Silence of Congress*, 41 Harv. L. Rev. 200, 220 (1927).

section 28(a) of the Securities Exchange Act of 1934.[150] Though the circuit court below used legislative history of section 28(a)[151] to conclude that the state regulation allowed thereunder was solely that "of securities commissioners to regulate transactions *within their own borders*,"[152] such a limitation nowhere appears in the written text of section 28(a) or anywhere else in the 1934 Act. Recognizing that blue sky laws are designed to govern the sale of securities exclusively within one state, the ever widening scope of "interstate commerce"[153] makes it increasingly difficult to claim that *any* activity, particularly a securities transaction, is wholly intrastate and, thus, within the exclusive province of the states. Yet, Congress has made no attempt to limit state action in the securities field—and state corporate takeover laws provide no exception to this general satement. In both *Piper v. Chris-Craft Industries, Inc.*[154] and *Santa Fe Industries, Inc. v. Green*[155] this Court, absent a clear congressional mandate, emphasized its reluctance to federalize judicially areas of securities regulation law traditionally regulated by the states. Thus, a judicially imposed requirement that tender offers be solely regulated by federal law seems inappropriate. This is not to say that there do not exist cogent arguments for uniform

[150]15 U.S.C. § 78bb(a) (1970).

[151]H.R. Rep. No. 85, 73d Cong., 1st Sess. (1933).

[152]Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1281 (5th Cir. 1978).

[153]For example, in *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 30 (1974), cotton to be delivered to a warehouse located in the same state as the farm upon which it was grown was held to be within interstate commerce because delivery to the warehouse where cotton was sorted and classified was essential for completion of what would eventually be an interstate transaction.

[154]430 U.S. 1 (1977).

[155]430 U.S. 462 (1977).

federal rules of securities regulation with express federal preemption,[156] or even that the entire field of corporation laws should be federalized.[157] The decision should rest, however, with Congress, not with the courts.

A commerce clause challenge to Arkansas' full-crew train laws, in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pac. R.R. Co.*, 393 U.S. 129 (1968), was met by this Court's reference to its 1966 decision in a case of the same name,[158] in which it held that congressional action referring the union-railroad dispute over required crew size to arbitration was not preemptive of state legislation, and upheld the state full-crew law on commerce clause grounds. This Court characterized its 1966 decision as holding that "Congress was aware of state full-crew laws and did not intend to override them,"[159] thus it could not be said that state laws placed an impermissible burden on interstate commerce. The Court reminded:

> As we have said many times, Congress unquestionably has power under the Commerce Clause to regulate the number of employees who shall be used to man trains used in interstate commerce. In the absence of congressional action, however, we cannot invoke the judicial power to invalidate this judgment of the people of Arkansas and their elected representatives as to the price society should pay to promote safety in the railroad industry.[160]

[156]Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 Yale L. J. 663, 698-99 (1974).

[157]*Id.* at 696-700; Note, *Federal Chartering of Corporations: A Proposal*, 61 Geo. L. J. 89, 90-98 (1972).

[158]Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pac. R.R. Co., 382 U.S. 423 (1966).

[159]393 U.S. at 134.

[160]393 U.S. at 144.

Reaching a contrary result would violate the balance of power between Congress, the States, and the federal courts, and this Court admonished:

> We think it plain that in striking down the full-crew laws on this basis, the District Court indulged in a legislative judgment wholly beyond its limited authority to review state legislation under the Commerce Clause.[161]

Unfortunately for appellants, the courts below have indulged in this same type of impermissible legislative judgment in determining that the Idaho Corporate Take-Over Law placed an undue burden on interstate commerce. In *Merrill Lynch, Pierce, Fenner & Smith v. Ware,* 414 U.S. 117 (1973), this Court followed its conclusion that state law was not federally preempted and quickly disposed of the Commerce Clause challenge by reference to several earlier cases for the proposition:

> What has been said above [about preemption] provides the answer to [the Commerce Clause] argument. It is in line with the principle, long established, that the National Government's power, under the Commerce Clause, to regulate commerce does not exclude all state power of regulation.[162]

The principal consideration underscoring development of the foregoing cases is the paramount principle that federal courts must not indulge in the legislative function of weighing benefits of state regulation against purported burdens on interstate commerce in situations where Congress has expressed its intention that a particular field of regulation

[161] *Id.*

[162] 414 U.S. at 140.

is permissibly addressed by the states. There are practical reasons for such a conclusion as well as the legal ones. State legislation at once allows pursuit of important local interests and permits the states to function as laboratories in the federal-state system.[163] It is possible that the extended time periods for consummation of tender offers established in the 1976 Antitrust Improvements Act and announced recently by the SEC were shown to be valuable as a result of experience under state takeover laws which demonstrated that extended time periods did not chill use of tender offers or defeat their consummation. Regardless, it is important that federal courts not choke off an area of state regulation by engaging in that type of legislative balancing of interests which Congress has explicitly declined to employ.

Cases relied upon by the courts below for the proposition that a court should weigh benefits of local regulation against alleged burdens on interstate commerce are inapposite here because they all deal with situations in which Congress neither expressly nor impliedly authorized state legislation. For example, in *Pike v. Bruce Church, Inc.,* 397 U.S. 139 (1970), Congress never considered the problem of packaging cantaloupes for interstate shipment. In view of the total lack of congressional encouragement for the type of state statute involved, this Court was forced to balance the competing state and federal interests presented. The same is true of regulating of shrimp packing at issue in *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928). But, in the field of securities regulation, Congress

[163] *See* New State Ice Co. v. Liebman, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting).

has left to the states the concurrent right to regulate; the right is recognized historically, as well as specifically by section 28(a) of the Securities Exchange Act of 1934.

B. In Determining Whether a State Law Unduly Burdens Interstate Commerce, a Three-Step Analysis Is Employed

The criteria for determining the validity of state statutes which affect interstate commerce stem from *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Commerce clause analysis typically involves complex federalism and statutory interpretation issues. The more recent trend of this Court's decisions indicates reluctance to find impermissible conflicts between the commerce clause and state laws, and, while a few state laws have been struck down,[164] yet others which clearly affected interstate commerce have been upheld.[165] The test recently applied by this

[164] *E.g.* City of Philadelphia v. New Jersey, 437 U.S. . ., 98 S.Ct. 2531 (1978) (New Jersey statute prohibiting importation of solid and liquid wastes violates commerce clause); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978) (Wisconsin law barring tandem vehicles over 55 feet long invalid under commerce clause); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977) (North Carolina statute prohibiting all apple grade designation other than applicable federal grade violates commerce clause).

[165] *E.g.* Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) (Iowa single-factor sales formula for apportioning net income of interstate corporations—which could result in taxation of 100% of net income from products sold in Iowa but manufactured outside the state—does not violate commerce clause); Exxon Corp. v. Maryland, 437 U.S. 117 (1978) (upholding Maryland statute prohibiting producers or refiners of petroleum products from operating service stations in state).

Court in commerce clause cases requires a balancing of legitimate state interests served by the challenged local law against that law's impact on interstate commerce.[166] If a state law substantially impedes the free flow of commerce between the states or affects an area of commerce that *requires* national uniformity, it will generally be found to violate the commerce clause.[167] Under *Pike* the Court made it clear that a state law affecting or regulating interstate commerce will be upheld so long as it accomplishes a legitimate state interest and if the burden imposed on commerce does not outweigh the putative local benefits of the state law.[168] The extent of the burden that will be tolerated depends, in part, upon whether the local interest could be as well promoted with a lesser impact on interstate commerce.[169]

1. The Idaho Corporate Take-Over Law Promotes a Legitimate Local Interest

The primary local interest promoted by the Idaho Corporate Take-Over Law is protection of investors in corporations which are incorporated within or substantially

[166] In *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 441 (1976), the Court stated that commerce clause inquiry "necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *See also* Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 371-72 (1976) (when a statute promoting a legitimate state interest also burdens interstate commerce Court "is confronted with a problem of balance").

[167] Southern Pac. Co. v. Arizona, 325 U.S. 761, 767 (1945).

[168] 362 U.S. at 142. *See also* Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 443-44 (1960).

[169] *Id.*

related to the State of Idaho. Both courts below have denigrated this interest of the State of Idaho,[170] thus causing Idaho to "lose the entire commerce clause battle in the initial skirmish."[171] The degree of delay occasioned by the Idaho law (with its elimination of the possibility of a "Saturday night special"), the additional disclosure to shareholders, and protection of investors from fraud as well as their own imprudence in too hastily accepting the invitation to tender some or all of their securities in the target company, coupled with state regulatory involvement all coalesce to protect investors. Moreover, these same considerations supply a marked degree of protection of creditors and employees of the target company as well as of the corporate entity itself.[172]

[170]Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1283, 1285 (5th Cir. 1978) (J.S. App. A-53, A-59); Great Western United Corp. v. Kidwell, 439 F.Supp. 420, 437-38 (N.D. Tex. 1977) (J.S. App. A-121 - A-123).

[171]Note, *The Constitutionality of State Takeover Statutes: A Response to* Great Western, 53 N.Y.U.L. REV. 872, 921 (1978).

[172]Certainly it cannot be claimed that state interest in promotion of employment and management opportunities within Idaho and protection against an adverse economic effect on Idaho business—a collateral effect of the Idaho Corporate Take-Over Law—is a somehow illegitimate exercise of the police power to protect a local public interest. That protection of such legitimate local interests incidentally happens to benefit target company management due to the delay factor state laws inject into the tender offer process is of little consequence—particularly now that both Congress (in certain antitrust contexts) and the SEC (in takeovers generally) are acting to insert delay factors into the federal law schema.

The absence of an administrative forum under the Williams Act has caused target companies, where no state law governed, to resort to the courts, and federal courts have been willing in several cases to grant injunctions for consideration of the effects of a tender offer on a target corporation's customers, suppliers, and employees—as well as the interests of the target company shareholders. *See, e.g.* Elco Co. v. Microdot, 360 F.Supp. 741 (D. Del. 1973) *and* Boyertown Burial Casket Co. v. Amdeco, Inc., 407 F.Supp. 811 (E.D. Pa. 1976) [customers, shareholders & employees]; Gulf & Western Industries, Inc. v. Great Atl. & Pac. Tea Co., 476 F.2d 687 (2d Cir. 1973) [target company shareholders].

The purpose of investor protection also underlies state blue sky laws and has long been recognized as a legitimate state interest.[173] Although takeover laws, including Idaho's, have a more broad scope than blue sky laws they are nonetheless based primarily on a legitimate local interest in protecting local investors. That the takeover laws have an extraterritorial reach is a necessary concommitant of meaningful protection of domestic investors, as will be developed at length below. State police power to provide state regulation of a myriad of activities to protect the health and welfare of state residents forms the foundation of this investor protection. Thus, unlike the singular purpose of the *Pike* statute, the Idaho Corporate Take-Over Law serves multiple ends.

The inquiry as to whether the State of Idaho has a legitimate interest in investor protection (and, collaterally, in protection of creditors and employees of a target company and its corporate entity):

> under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation are reasonably adapted to the end sought.[174]

Courts may not sit as legislatures, state or national, to debate the wisdom of state laws which may place an incidental burden on interstate commerce:

[173]I L. LOSS, SECURITIES REGULATION 23 ff. (2d ed. 1961); Hall v. Geiger-Jones, 242 U.S. 539 (1917).

[174]South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 190 (1938).

> It is not any the less a legislative power committed to the states because it affects interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment.[175]

There is uncontradicted evidence in the record herein that the challenged Idaho law does not *prevent* takeovers of corporations with substantial Idaho connections.[176] Appellee's own witness testified that state takeover laws are designed to give shareholders enough time "to determine whether or not they will tender" their stock.[177] The Idaho law protects shareholders by affording the Director of the

[175] *Id.* at 191. *See also* Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pac. R.R. Co., 393 U.S. 129, 138-39 (1968). *See generally* Bickle, *Judicial Determinations of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6 (1924).

[176] Testimony of Mr. Bartell (Trial Tr., 65) (A. 198); Testimony of Mr. Wheat (Trial Tr., 250) (A. 262-263).

To claim that delay defeats tender offers is to use a tired, disproven maxim. *See, e.g.* Note, *The Courts and the Williams Act: Try a Little Tenderness*, 48 N.Y.U. L. REV. 991, 994-95 (1973). Quite to the contrary, delay frequently benefits shareholders by encouraging an auction market for target company stock. *See* Robinson, *Directors Under Attack in New 'Bear Hug' Mergers*, N.Y.L.J., June 12, 1978, at 25, col. 1, 41, col. 1. A leading practitioner in the tender offer field commented:

> There is a question of utility [of the takeover] under the various state takeover laws. Do they, in effect, destroy the value of the takeover as a corporate tool? I think the answer • • • is no. What the state takeover laws do, by and large, is merely provide for delay. The delay will mean that you are not going to get quite the same bargain you might otherwise have gotten on a short-fuse tender or so-called "Saturday night special." But • • • once you put your offer on the table • • • the ball is in play and *that* [*target*] *company will go somewhere.* Then it is a bidding match and you have your opportunity to bid. So, to that extent, it is still a very useful tool.

Flom, *The Role of the Takeover in the American Economy*, 32 BUS. LAW. 1299, 1299 (1977) (emphasis supplied).

[177] Testimony of Mr. Bartell (Trial Tr., 88) (A. 214-215).

Department of Finance opportunity to review takeover filings, by allowing the target company board of directors to exercise its fiduciary responsibilities, and by giving shareholders additional time and information with which to make informed investment decisions, with the result that rationality of negotiation may be restored to the heretofore rapid-fire tender offer transaction. The Idaho law applies equally to Idaho and out-of-state offerors, thus it does not discriminate in favor of Idaho residents and against residents of other jurisdictions. Regulation turns on the relationship of the target company to the State of Idaho, thus cases such as *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977), are inapposite. Nor does the Idaho law require something to be done in Idaho that could more efficiently be done elsewhere, thus making cases such as *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928), and even *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), likewise inapposite.

Though the additional delay occasioned by state takeover laws such as Idaho's has been criticized, one of Appellee's own witnesses testified that under state law "the price that has been paid for the shares has almost always gone up so that the shareholders received a greater consideration for their shares in connection with takeovers that ultimately were consummated."[178] One of Appellants' witnesses underscored the reason for such a result:

> The problem, really, involved here is that takeovers are basically an economic opportunity, and only economic opportunists participate. • • • The object is to buy something as cheaply as you can and as fast as

[178] Testimony of Mr. Bartell (Trial Tr., 84) (A. 212).

you can and get away as quickly as you can before somebody else smells what the game is about and can join in and throw another bid into the pot.

The net result is that, obviously, the shorter the tender period, the more opportunity for success for the original offeror.[179]

Further uncontradicted evidence reveals that infirmities of the marketplace have caused shares in many corporations to be undervalued, often sufficiently so as to make the company vulnerable to takeover bids at bargain prices.[180] It is in this arena of high stakes gambling for corporate control that shareholders need the ability to make considered, informed judgments about what *they* should do with *their* target company shares.

A tender offeror may use the approach of Appellee herein and make a "bear hug" un-negotiated takeover proposal to target company management, hoping to effect an uncomplicated takeover and, under state laws like Idaho's, avoid the necessity of compliance with a state corporate takeover law.[181] If target company management rejects the friendly offer the next step (as occurred herein) is to make a subsequent public offer at a lower price, thereby foreclosing shareholder opportunity to consider the higher price and proposal that was offered solely for management consideration. As one author notes:

[179]Testimony of Mr. Chatlos (Trial Tr., 335-36) (A. 284-85).

[180]Testimony of Mr. Chatlos (Trial Tr., 336-37) (A. 285-86).

[181]IDAHO CODE § 30-1501(5)(e) (Supp. 1978). The theory underlying this exemption is that target company management is under a fiduciary duty to shareholders to act in their best interests and that it is not necessary for a state to apply a governmental overlay to action already governed by high legal standards.

The strategem of dropping an initial tender price is occasionally employed to incite shareholder pressure on management, or at least to instill in management the fear of shareholder suits. But in the majority of cases in which tender offers have been delayed due to state hearings, shareholders have received more than the original offer price, primarily as a result of competitive bidding.[182]

[182]Note, *The Constitutionality of State Takeover Statutes: A Response to* Great Western, 53 N.Y.U. L. Rev. 872, 925 (1978). Examples of the beneficial effect of delay and of takeover battles in five actual situations has been illustrated in *The Great Takeover Binge*, BUSINESS WEEK, Nov. 14, 1977, at 176 (reproduced below):

What takeover battles do to stock prices

	Winning Bidder	Losing Bidder
1.	Racal Communications	Applied Digital Data Systems
2.	J. Ray McDermott	United Technologies
3.	Norton Simon	Fuqua Industries
4.	Allegheny Ludlum Industries	Crane
5.	Northwest Industries	MCA

Target Company	Price of Target Before Bidding	Initial Bid	Winning Bid	Price-Earnings Multiple of Winning Bid	
Milgo Electronic	19⅛	28½	36	28	1.
Babcock & Wilcox	34¾	42	65	15	2.
Avis	14	15½	22	9	3.
Chemetron	30½	40	55	30	4.
Coca-Cola Bottling of L.A.	21¾	30	40	16	5.

Data: First Boston Corporation

Recently, as an exhibit in unsuccessful litigation involving a shareholder challenge to the high price Kennecott paid for Carborundum, a study by First Boston Corp. on premiums paid in

Though one may speculate about the use of various strategems by tender offerors there is no cause to conclude that any effect of the operation or existence of state corporate takeover laws acts to the detriment of those persons state law (as well as the Williams Act) was designed to protect. In fact, the corporate auction process fostered by state laws has resulted in premiums for shareholders amounting to

1977 in cash tender offers was introduced. A portion of that Exhibit reveals:

Exhibit

Premiums and multiples paid in selected 1977 cash tender offers

	Premium Over Price Prior to Announcement			Offer as Multiple of		Number of
	One Day	One Week	Four Weeks	Net Income	Book Value	Transactions
For all offers						
Average	57.5%	66.3%	73.7%	15.9x	1.7x	23
Median	54.6	66.2	67.6	14.3	1.7	
For friendly offers						
Average	58.1	65.8	74.9	15.9	1.8	18
Median	54.0	63.4	74.9	15.3	1.8	
For unfriendly offers						
Average	60.6	69.3	72.0	16.6	1.5	4
Median	66.2	66.2	68.8	13.9	1.5	
For offers after competing bids						
Average	73.0	78.5	91.1	17.6	1.9	8
Median	73.5	76.6	93.2	15.3	1.8	

Source: First Boston Corporation

Reproduced in Chatlos, *The SEC vs. investors on tender offers,* in Ideas for Action, HARV. BUS. REV. 6, 7 (Sept.-Oct. 1978).

As pointed out by an expert in the field of tender offers whose firm represents both offeror and target:

> A perusal of these [First Boston] figures provides ample evidence of evaluations by hard-headed corporate executives as opposed to the price structure in the malfunctioning marketplace. In those instances involving four weeks or longer, which by corporate standards provide a reasonable opportunity for accumulation and evaluation of facts, the business community saw fit to make bids that averaged an astonishing 91.1% over market price and reflected an average of 17.6 times earnings and 1.9 times book value. While some modest premium could be attributed to the satisfaction of managerial egos or the expected synergism of melded assets, such considerations could scarcely account for these figures.

Id.

hundreds of millions of dollars over the original bids.[183] Any real or threatened detriment to a tender offeror is not only speculative but also outside the scope of both state and federal law purposes in tender offer regulation.

Another challenge to the purpose of state takeover laws, such as Idaho's, has been that the delay factor occasioned by such laws provides target company management opportunity to make defensive moves in an attempt to defeat the takeover bid. Such analysis smacks of a defense of the "Saturday night special" as a rule of law, and is vulnerable on several grounds. First, any initial "balance" created in 1968 in the Williams Act was shifted by the 1970 amendments thereto which lowered the threshold level of acquisition of shares which triggers the Act's applicability from 10% to 5%, thus giving target company management information that a takeover attempt was occurring before a substantial amount of stock had already been acquired (and effective control may in some instances nearly have been achieved. Next, the 1976 Antitrust Improvements Act acted in larger transactions to inject a delay period longer than that provided in the Williams Act. Finally, recent

[183] In a study of contested tender offers by the leading proxy solicitation and investor firm of Georgeson and Co. from November 1974 through 1976:

> we found that in 20 offers a total premium of $186 million over the original bids accrued for the benefit of investors as a result of the corporate auction process fostered by the state restraints. On the other hand, during these 26 months only 2 competitive offers were completed in seven days or less, involving a premium of approximately $7 million. Through June 1978, the accumulative premium to stockholders was well in excess of $1.1 billion over the original bid, *thanks to the state laws.*

Chatlos, *The SEC vs. investors on tender offers* in Ideas for Action, HARV. BUS. REV. 6, 7 (Sept.-Oct. 1978) (emphasis supplied). *See also* Testimony of Mr. Chatlos. (Trial Tr., 374) (A. 288-89).

SEC proposals for a 30 day delay period in takeover bids has further shifted the balance between raider and target. Yet, it is clear that the intent and effect of each change is synonymous with the underlying purpose of both the Williams Act and the Idaho Corporate Takeover Law—investor protection.

If target company management intends to breach its fiduciary duties, state takeover laws do not provide an exclusive vehicle. Target company management has a number of "defensive" tactics other than the delay factors of state takeover laws available for use in attempting to thwart takeover bids. In fact, one text has been written devoted exclusively to that subject.[184] The defensive maneuvers, exclusive of state takeover laws, suggested for the use of target company management include: charter and by-law amendments to assure continuity of management by making it more difficult to replace directors and to establish provisions to protect "minority" shareholders (often known as "shark repellent" clauses); adoption of "supermajority" voting provisions for transactions between the target and an "interested shareholder" (usually one who holds a certain percentage of stock); deterrence by developing or acquiring business operations subject to governmental regulation of changes in their ownership or control; once the identity of the actual or potential tender offeror is known, the target may acquire a company in a

[184]A. Fleischer, Tender Offers: Defenses, Responses, and Planning (1978). Chapters in other texts have been devoted to the same defensive maneuvers. *See, e.g.* E. Aranow & H. Einhorn, Tender Offers for Corporate Control, Ch. 9 (1973); E. Aranow, H. Einhorn & G. Berlstein, Developments in Tender Offers for Corporate Control, Ch. 4 (1977); 1 M. Lipton & E. Steinberger, Takeovers and Freezeouts, Ch. 6 (1978).

competing or related industry and seek protection under the antitrust laws; transfer of target company stock into "friendly" hands; make the target less attractive by utilizing surplus cash: to acquire a business, retire debt, repurchase outstanding stock, or increase its dividend; press releases or other communications to shareholders attacking the offer and emphasizing its deficiencies; litigate: particularly through use of antitrust challenges, suits to challenge deficiencies or failure to comply with federal disclosure laws, challenging questionable payment disclosures in SEC filings; securing a better offer from either the original bidder or a "white knight;" other by-law or charter amendments to create staggered boards of directors, elimination of cumulative voting, sale of a small class of preferred stock to "friendly" shareholders whose approval is needed before any merger or sale of assets proposal may be accepted, establishment of a maximum number of directors (usually equal to or just greater than the number currently elected to direct the corporation), limit the ability of shareholders to remove directors in advance of expiration of their terms, selection of "stand-by" directors to fill any vacancies that may occur during tenure of the existing board of directors; establishment of formulas for determining the minimum price at which minority shareholders may be bought out or squeezed out by a shareholder who acquires control; establishment of an employee stock ownership plan; announcement of a stock split; concentrated selling of the tender offeror's shares by friendly third parties to decrease market value of any securities being offered in exchange for tendered shares; insertion of control clauses in loan agreements and long-term employment

contracts. The introduction of state corporate takeover laws into the tender offer scene does not provide target company management with some new and exclusive "tool" to use to attempt to defeat tenders. The state laws provide significant legitimate shareholder protection; that they may be used or abused by non-beneficiaries is immaterial.

The state corporate takeover laws do nothing more than bring the tender offer closer to the more common techniques by which corporate ownership and control are transferred, such as mergers, exchange offers, sales of assets, and sales of controlling blocks of stock. In fact, as will be developed more fully below in discussing burden on commerce, state regulation of tender offers, side by side with federal regulation, is strikingly similar to the procedures extant in proxy contests. All these techniques are consummated through a process of deliberation and negotiation, with the interests of shareholders primarily safeguarded by state law and normal market processes. One might well ask why, if delay and disclosure are advantageous to the shareholder in *all other* types of change in corporate control, delay and added disclosure are considered improper in the tender offer context.

Testimony of former SEC Commissioner Wheat described how state takeover laws protect what, in effect, becomes a new, second market in securities of a target company during a tender offer bid:

> First of all, there is the general trading market for the securities of the target company and the market will, of course, react to a takeover bid. * * * And if under the Williams Act, for example, a bidder can ram through swiftly a tender offer before there is an opportunity to bring into that market for that controlling block [of shares] other potential bidders who may be very much interested, but who obviously take a little longer to gear up and have a look at the situation, then you do not have a good market because you have by definition failed to bring together those who are or have an interest in buying to [sic.] those who have an interest in selling. To that extent and in that limited context, the state tender offer statutes provide a better market.[185]

Certain other interests which underlie the Idaho Corporate Take-Over Law are particularly applicable to corporations, such as the target company herein, which have their principal place of business and substantial assets in Idaho. Modern corporations have a significant impact upon the communities in which they are located, not only in economic but also in social terms. A corporation can influence significantly local lifestyle and tone, particularly in large cities, both affirmatively (*e.g.* by commitment to charitable and civic affairs) and negatively (*e.g.* by lack of commitment to pollution control or occupational safety and health). A state, such as Idaho, which affords to corporations physically located in its boundaries innumerable privileges and protections as a matter of well settled corporate law, has a legitimate interest in ensuring that changes in corporate control result from the exercise of informed, considered judgment exercised by the shareholders of a target company either as a result of state takeover law protections or through exercise of fiduciary responsibilities by corporate management. Though the same economic rationale does not apply to a corporation merely

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[185]Testimony of Mr. Wheat (Trial Tr., 305-07) (A. 275-76).

chartered in Idaho, with offices and assets elsewhere, traditional concepts surrounding the right of the state of incorporation to regulate domestic corporations, coupled with the overriding domestic shareholder protection concerns, justify the applicability of state takeover laws.

With respect to tender offer bids, the regulatory methods embodied in the challenged Idaho law—waiting period, disclosure, and standards of substantive fairness—are well accepted means of shareholder protection which in other contexts have not stifled sales of securities, takeovers by proxy fights, or capture of control through an exchange offer. The Idaho Corporate Take-Over Law is a logical extension of the minimal requirements of the Williams Act, the Securities Exchange Act of 1934, and the SEC's proxy rules.[186]

2. The Extraterritorial Reach of the Idaho Corporate Take-Over Law is a Necessary Incident of the Goal of Achieving Effective Shareholder Protection.

The linchpin of constitutional challenges to state corporate takeover laws, and Idaho law provides no exception, is that the laws attempt to apply not only to target company shareholders within the regulating state, but nationally (or globally) as well. If this be so, the challenge is truly not to the *effect* of extraterritorial reach—for all state regulation of commerce is extraterritorial to some extent because it inevitably affects interests operating both inside and outside the state—but to the *scope* of that reach.

[186]*See* Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 CAS. W. RES. L. REV. 722, 758 (1970).

Unquestionably, effective regulation of takeover bids depends on regulatory statutes having extraterritorial scope so as to affect all shareholders of a target company. If the regulating state could merely govern in-state transactions the tender offeror could avoid regulation by all but the most populous states (or states with the highest degree of stock exchange trading) by refusing to solicit the in-state shareholders of the state whose takeover law it sought to avoid. There is simply no alternative form of regulation of corporate takeovers, less global in reach and less arguably "burdensome" on interstate commerce which effectively could serve legitimate state interests in shareholder protection under a tender offer.

As earlier noted, the broad reach of the concept of "interstate commerce" in modern times makes it well nigh impossible to claim that any activity is wholly intrastate.[187] Securities transactions are no exception. The Idaho Corporate Take-Over Law covers *only* companies with a nexus to the state of a type which supports internal affairs regulation—regulation involving "the relationships *inter sese* of the corporation, its directors, officers, and stockholders"[188]—which Idaho may reasonably regulate on a nation-wide basis. That a takeover bid is essentially an internal affairs matter underlies an implicit premise of the viability of the Idaho law.

Where a tender offer is directed toward a corporation incorporated in Idaho the internal affairs doctrine appears

[187]*See, e.g.* Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974).

[188]Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Scope of Full Faith and Credit*, 58 COLUM. L. REV. 1118, 1124 (1958).

readily applicable.[189] The desirability of uniform resolution of such internal affairs matters of corporate life such as "shareholders liability, validity of stock issues, ability to merge and effect other organic changes, election of directors, voting trusts and voting agreements, dividends, relative rights of shareholders, and duties of officers, directors, and controlling shareholders to the corporation and to shareholders"[190] causes courts almost without exception to decide such questions by applying the law of the incorporating state, "regardless of where the operative acts occurred."[191]

Before delving more deeply into the internal affairs concept, it is well to underscore what is involved in a cash tender offer. Contrary to the suggestion of the circuit court below, a tender offer *is not* a mere "sale of securities from one shareholder to another [without] a change in the corporation itself,"[192] nor is it a mere aggregate of nu-

[189]*See* Latty, *Pseudo-Foreign Corporation*, 65 YALE L. J. 137, 138-43 (1955) (listing eight justifications for governing an enterprise by the law of the state of incorporation—the charter as a contract, the corporation as a creature of the chartering state, certainty and ease of application, the difficulty of matching local law to foreign charters, conflict between local and foreign law, antiquated local laws, and lack of or improper local policies—and concluding that local policies outweigh these considerations so that the pseudo-foreign corporation should not be immunized from local laws).

[190]Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 CAS. W. RES. L. REV. 722, 742 (1970).

[191]*Id.*

[192]Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1280 n. 53 (5th Cir. 1978) (J.S. App. A-46).

Even the Senate Report on the Williams Act recognizes this fact:

> It has been argued that a cash tender offer is a straightforward business proposition which can be rejected or accepted by a shareholder like any other bid for his securities. But where no information is available about the persons seeking control, or their plans, the shareholder is forced to make a decision on the basis of a market price which reflects an evaluation of the company based on the assumption that that present management and its policies will continue.
>
> The persons seeking control, however, have information about themselves and their plans which, if known to investors, might substantially change the assumptions on which the market price is based.

SENATE COMM. ON BANKING & CURRENCY, FULL DISCLOSURE OF CORPORATE EQUITY OWNERSHIP AND IN CORPORATE TAKEOVER BIDS, S. REP. No. 550, 90th Cong., 1st Sess. 3 (1967).

merous transactions in the securities of the target company. On the contrary, a tender offer is a mass securities exchange transaction in which corporate restucturing through transfer of control and ownership are effected, and a fiduciary relationship arises between the existing shareholders and the newly-controlling offeror. While one may claim that in a partial tender offer, such as was involved in this instant case, the entire transaction may be accomplished in a matter of minutes due to action of arbitrageurs in the national market for securities of the target company, there is no factual basis for such a claim. Both the Williams Act[193] and Idaho law[194] provide for taking up tendered shares on a pro rata basis in a partial tender offer which results in more than the desired number of shares being tendered. In such a case, target company shareholders, whether they make an informed decision to tender all or merely a portion of their shares, will in most instances remain shareholders of the target company even after the takeover is consummated.[195] Even in a tender

[193]Section 14(d)(6), 15 U.S.C. § 78n(d)(6) (1970).

[194]IDAHO CODE § 30-1506(3) (Supp. 1978).

[195]If the offer is successful, and unless they have divested themselves of all their shares in the target, the existing shareholders inevitably become minority interests of the target, subject to a new, untested controlling interest. The takeover involves a change in corporate control, a new board of directors, the establishment of a fiduciary relationship between the offeror and remaining share-

offer for *all* the outstanding shares of a target company, a shareholder must be allowed the opportunity of making an informed choice of whether to tender at all, or whether to tender all or a portion of his or her shares. Perhaps for the highly sophisticated arbitrageur a quick sale for a profit is the exclusive motivation for a tender of shares, but for every other target company shareholder (from the institutional investor to the "mom and pop" small shareholders) the ability to make an informed choice is of prime importance. Even Congress appears to have rejected the contention that a tender offer is simply a sale of securities.[196]

Congressional action in passing the Williams Act was strongly motivated by the resemblance of a cash tender offer to a proxy contest and the corresponding similarity between a decision to tender and "the decision made on an original purchase of a security."[197] Thus, the reliance of the circuit court below on the distinction between a tender offer and a proxy contest appears singularly misplaced.[198] As one writer notes:

> Both the proxy contest and the original issuance of securities are subject to joint regulation by the federal government and the state of incorporation under the internal affairs doctrine.[199]

holders, a dilution in voting power of the remaining shareholders, and, not infrequently, a subsequent merger into the offeror—all of which are traditionally embraced within the internal affairs doctrine. Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Cas. W. Res. L. Rev. 722, 744-45 (1970), *cited with approval in* Langevoort, *State Tender Offer Legislation: Interests, Effects, and Political Competency*, 62 Cornell L. Rev. 213, 221-22 (1977).

[196]Senate Comm. on Banking & Currency, Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids, S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967).

[197]*Id.*

[198]Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1280 n. 53 (5th Cir. 1978) (J.S. App. A-46).

In a proxy battle for mere ouster of incumbent management without change in corporate structure there is, of course, need for a careful balance of the rights of both the incumbents and the dissidents. While a need for procedures as equitable as practicable exists in the other type of proxy contest for acquisition of corporate control (which does not necessarily involve a "dumping" of incumbent management, particularly if that management is efficiently running the company) a need for a "delicate balance" between both sides of such an economically motivated transaction does not exist. In this type of proxy battle, the challengers are willing to take an economic risk in order to get control of the company. The cash tender offer as a device for acquisition of corporate control stands singularly alone, despite entry of the Williams Act into the scene. *Any other* mode of acquisition of corporate control involves the necessity of registering securities under the Securities Act of 1933 or of utilizing the proxy machinery of section 14 of the 1934 Act—all of which involve great delay and much disclosure.

In other modes of transfer of corporate control, such as in an exchange offer of shares of the offeror for shares of the target, there exists the possibility of regulation by a great number of states as a result of offering a security to shareholders in many states. In the exchange type of

[199]Note, *The Constitutionality of State Takeover Statutes: A Response to* Great Western, 53 N.Y.U. L. Rev. 872, 932 (1978); *See* Bresnick v. Home Title Guar. Co., 175 F.Supp. 723, 724-25 (S.D. N.Y. 1959) (state proxy regulation); L. Loss & E. Cowett, Blue Sky Law 30-42 (1958).

tender offer (as opposed to a cash tender), the offeror, unless its securities are registered on a national exchange, must comply with the securities laws of each and every state in which reside shareholders of the target company—and such compliance involves delay, the possibility of hearings, and the like, and is a well accepted part of securities law. To say that if a tender offeror elects to use cash there exists a thin line or "delicate balance" in conduct of the offer which state laws upset, but that an election to make a stock tender offer legitimately brings into play a panoply of state laws, is absurd. And, in the proxy contest, with its built-in delay and adversarial context—as with a cash tender offer—one may assume fairness by incumbent management toward shareholders as a result of state laws which impose high standards of fiduciary duty, and the underlying spectre of lawsuits for breach of that duty imposing personal liability for wrongfully-acting target company officials. Professor Shipman contends:

> • • • [A] takeover bid is so similar to classical internal affairs transactions that the state of incorporation has legislative jurisdiction to prescribe reasonable uniform regulation. [Tender offer] bids are by definition made by an incipient controlling person who under traditional common law doctrines will acquire, upon successful completion of the bid, a fiduciary relationship to the corporation and all of its securityholders.[200]

Though direct corporate action is lacking, there is mass common action in tendering by persons whose sole, and mutual, link is the target corporation, and their actions

[200]Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act,* 21 CASE W. RES. L. REV. 722, 744 (1970) (*citing* Zahn v. Transamerica Corp., 162 F.2d 36 (3d Cir. 1947)).

will have a profound effect on the target, nontendering shareholders, and their own residual ownership of target shares. The effect of a successful tender offer bid on a tendering shareholder is akin to the effect resulting from a merger—a classic internal affairs transaction. It may also be argued that a tendering shareholder who remains after the tender as a target shareholder is also undertaking an action relating to the election of future directors and determination of future broad policy which will affect his remaining target securities. Thus, a tender offer is also a de facto proxy solicitation as well. In fact, the Letter of Transmittal to be used by tendering shareholders of Sunshine Mining Co. in submitting shares to Great Western United Corp. provided that the tender of shares included a tender of proxy.[201] Further support for the proxy contest analogy comes from the fact that when Congress passed the Williams Act it found that tender offer bids were functionally similar to proxy fights.[202] The Idaho Corporate Take-Over Law limits itself to regulatory practices that in similar contexts relating to internal affairs practices are widely used for shareholder protection.[203]

Certainly, many of the target corporations covered by the Idaho Corporate Take-Over Law, just as is Sunshine Mining Co. in this instant action (a Washington corpora-

[201]Idaho Defendants' Exhibit No. 3: Schedule 13D filed by Great Western United Corp. with Securities and Exchange Commission on March 21, 1977, pp. 1-3 of *Letter of Transmittal.*

[202]H.R. REP. No. 1711, 90th Cong., 2d Sess. (1968).

[203]Though a state shareholder protection statute which required a finding of fairness by a state official before approval of a merger of a domestic corporation introduced certain immobilities, such law appears to be permissible. SEC v. National Securities, Inc., 393 U.S. 453, 457, 460 (1969).

tion), will be "pseudo-foreign" corporations—those that are incorporated out-of-state but have most other significant contacts with the forum state.[204] With pseudo-foreign corporations, the forum state may generally apply its own law governing corporate affairs.[205] Though history suggests a preference for laws of the chartering state to govern internal corporate affairs, modern choice-of-law principles are sufficiently flexible to allow a balancing of competing state interests in determining applicable law to govern a particular transaction affecting corporate affairs.[206] A substantial body of case law demonstrates a judicial willingness to apply local law in lieu of chartering state law,[207] while states are becoming more aggressive in asserting legislative jurisdiction over local corporations regardless of their state of incorporation.[208] As businesses have expanded beyond state boundaries, the state of incorporation has become increasingly less relevant as a foundation for corporate regulation and may well have no greater significance than being the state wherein the incorporating papers have been filed.

Though assertion of jurisdiction due to the fact of incorporation in the forum state has a well established history "sanctified" by an impressive body of case law, basing application of corporate securities legislation on the cumulative tests of principal office and substantial assets ties the exercise of governmental regulatory power to corporations, pseudo-foreign in nature, that have a very real relationship with the forum state. The territorial breadth of forum state legislation under such conditions in no way

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[204] *See* Kaplan, *Foreign Corporations and Local Corporate Policy*, 21 VAND. L. REV. 433, 447 (1968); Latty, *Pseudo-Foreign Corporations*, 65 YALE L. J. 137 (1955).

A "pseudo-foreign" corporation has been defined as:

> [A] foreign corporation which [is authorized to transact business in the host state] and which engages in no substantial business activity in the state of its incorporation, and which by virtue of the place and character of its business is more closely identified with the business life of [the host state] than that of any other state.

Latty, Powers & Breckenridge, *The Proposed North Carolina Business Corporations Act*, 33 N.C. L REV. 26, 52-53 (1954) (*quoted in* Baraf. *The Foreign Corporation—A Problem in Choice-of-Law Doctrine*, 33 BROOKLYN L. REV. 219, 250 n. 130 (1967)).

Though the circuit court foreclosed any pseudo-foreign corporation analysis by its conclusory finding that its application was based upon having a certain percentage of target company shareholders in the host state, (577 F.2d at 1280 n. 53) (J.S. App. A-46), that conclusion is not supported by the authority the court cited (*citing* Western Air Lines, Inc. v. Sobieski, 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961)). *See* R. JENNINGS & H. MARSH, CASES AND MATERIALS ON SECURITIES REGULATION 1289 (4th ed. 1977):

> [T]he [*Western Air Lines*] court totally failed to give any guidance to the bar as to which of these factors [having its principal office in the host state, having a substantial portion of its revenues derived from business done in the host state, or having a large portion of its shares held by residents of the host state] were decisive or even significant.

[205] *Id.*

[206] RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 6(2) (1971).

[207] *See* Mansfield Hardwood Lumber Co. v. Johnson, 268 F.2d 317, 321-22, 327 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959) (Delaware corporation subject to Louisiana statute in suit for fraud) Blazer v. Black, 196 F.2d 139, 146 (10th Cir. 1962) (president of Illinois corporation subject to Kansas statute defining cause of action for fraud); Western Air Lines Inc. v. Sobieski, 191 Cal. App. 2d 399, 411, 12 Cal. Rptr. 719, 727 (1961) (Delaware corporation subject to California mandatory cumulative voting); State ex rel. Weede v. Iowa S. Util. Co. of Del., 231 Iowa 784, 807-08, 2 N.W.2d 372, 384 (1942), *aff'd sub nom.* State v. Bechtel, 239 Iowa 1298, 31 N.W.2d 853 (1948), *cert. denied*, 337 U.S. 918 (1949) (Delaware public utilities corporation subject to Iowa statute in recapitalization scheme); German-American Coffee Co. v. Diehl, 216 N.Y. 57, 62-65, 109 N.E. 875, 876-77 (1915) (New Jersey corporation subject to New York regulation of dividend declaration).

[208] *See, e.g.* CAL. CORP. CODE § 2115 (West 1977 & Supp. 1978); N.Y. BUS. CORP. LAW §§ 1315-1320 (McKinney 1963).

impugns the legitimacy of the interest in protecting in-state shareholders.[209] Effective regulation of takeover bids for the protection of Idaho shareholders depends on the extraterritorial reach of the Idaho Corporate Take-Over Law; if Idaho could reach only in-state transactions, any potential offeror would avoid the State's regulation by simply refusing to solicit shareholders in Idaho. Though shareholders in Idaho "who wished to take advantage of an attractive offer, * * *, could sell their shares in the open market where the price of the target' shares will normally

[209]Should there be a reluctance on the part of Idaho to assert jurisdiction over a true "pseudo-foreign" corporation that, for some reason, had no shareholders in the state? For example, assume the extreme situation in which an out-of-state chartered target corporation had its principal corporate offices and 100% of its assets in Idaho, yet no Idaho shareholders. In such a situation management of the target represents, in its state law fiduciary capacity, *all* target company shareholders. Thus, Idaho has an interest in insuring that these fiduciaries perform their trust properly, and, in a sense, even though no shareholders physically live in Idaho, all shareholders are "present" in Idaho as a result of the actions management is obligated to take in their behalf. Idaho has a legitimate state interest in insuring that management actions are fairly taken based upon refined disclosure and ample time within which to give careful consideration to tender offeror proposals. *See* Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341, 364 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973); Swanson v. American Consumer Industries, Inc., 415 F.2d 1326 (7th Cir. 1969). Idaho has a legitimate state interest in the business enterprise in the State of Idaho and in the representative capacity in which management in Idaho acts in behalf of shareholders of the target company wherever they are located; jurisdiction should, therefore, be asserted by Idaho over this hypothetical company.

Though the possibility of multi-state jurisdiction being asserted has been raised in this case, it never occurred and should not, thus, be speculated upon. In all likelihood comity principles would take care of any potential overlap, with states of potential jurisdiction deferring to the state determined among them to have the most significant relationship with the target and offer a high degree of shareholder protection. There is a long history of exceptional cooperation among states in the field of blue sky law administration, and there is no reason to assume that the same cooperation would not obtain regarding state tender offer regulation.

be trading at only a fraction less than the consideration offered by the tender bid,"[210] such appealing logic is overly simplistic and ignores advantages to shareholders of a direct tender. Under the Wiliams Act[211] and under the Idaho law[212] a shareholders who tenders directly to the tender offeror is entitled to any increased consideration offered before the offer's expiration. Under both laws, if during a specified period of time within the offer period something causes a directly tendering shareholder to change his mind and withdraw his tendered shares, he may do so without penalty or cost.[213] These opportunities are no longer available to the shareholder who sells on the open market "at only a fraction less"—plus broker fee—than the tender offer price. The advantages such a shareholder could have obtained through a direct tender will inure to the benefit of the one who purchased his stock—probably an arbitrageur. To accomplish the goal of protection of local shareholders the Idaho Corporate Take-Over Law *must* utilize an extraterritorial reach which, as a necessary incident to protection of domestic shareholders, confers the benefits of Idaho law on target company shareholders wherever they are located. Sans its extraterritorial scope domestic shareholder protection could well turn into in shareholder detriment, for purely local applicability of the law would make it a chimera as tender offerors avoided making offers in Idaho.

[210]E. Aranow & H. Einhorn, Tender Offers for Corporate Control 157 (1973).

[211]Section 14(d)(7), 15 U.S.C. § 78n(d)(7) (1970).

[212]Idaho Code § 30-1506(4) (Supp. 1978).

[213]Section 14(d)(5), 15 U.S.C. § 78n(d)(5) (1970); Idaho Code § 30-1506(2) (Supp. 1978).

3. The Idaho Corporate Take-Over Law Does Not Impose a Burden on Interstate Commerce Which is Clearly Excessive in Relation to the Local Benefits.

This final *Pike* criterion seeks to determine whether the burden challenged state legislation places on interstate commerce is clearly excessive compared to the putative local benefits, and generally derives its origin from *Southern Pacific Co. v. Arizona,* 325 U.S. 761 (1945), in which the direct regulation of train lengths was held an unconstitutional burden on commerce since the prospect that each state might mandate different maximum lengths was potentially hazardous to interstate commerce, and the need for a uniform national system of railroad regulation outweighed any state interest in protecting the safety of its citizens. Though one author, who begins with the premise that state takeover laws are unconstitutional, then reaches the foregone conclusion, argues that *Southern Pacific* is analogous to the takeover law context, thus dispositive of the commerce clause issue,[214] quite the converse is true. Unlike railroad regulation, the need for "uniformity" in securities regulation is not compelling, and has not been since the earliest entry of federal law into the securities field.[215] Thus, there is little to distinguish the tender offer issue from commerce clause issues commonly raised by state blue sky laws. Further, state tender offer regulation does not discriminate against other states—in turn motivating

[214]Note, *Commerce Clause Limitations on State Regulation of Tender Offers,* 47 S. CAL. L. REV. 1133, 1161-62 (1974).

[215]The right of states to act in the securities field, as discussed above, exists historically quite independently of the federal recognition of state regulatory right in section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a) (1970).

them to retaliate against the regulating state, thus creating a "balkanization" result.[216] Moreover, *Southern Pacific* may lack doctrinal foundation in constitutional law[217] inasmuch as it appears that this Court has often applied an ad hoc balancing approach to commerce clause issues notwithstanding its reiteration of such concepts as "direct" and "indirect" burdens in *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970).

Applying these commerce clause standards to the Idaho Corporate Take-Over Law reveals, first, that the law operates in a field (securities regulation) which does not now require and has never required national uniformity. Any "uniqueness" of the takeover law overlay onto already existing securities legislation has failed to prompt Congress to change the status quo of federal-state cooperative regulation into preemptive federal regulation. Previous analysis of the need for extraterritorial reach of state takeover laws forecloses the possibility of a state law with a lesser impact on interstate commerce if meaningful regulation of local shareholder interests is to be provided. The issue, thus, becomes one of determining the degree of balance between

[216]The "balkanization" concept suggests that if one state is allowed to erect "hostile economic barriers" inhibiting free trade with other states, those affected states will erect retaliatory barriers. *See* H.P. Hood & Sons v. DuMond, 336 U.S. 525, 537-39 (1949). This is absent in the context of takeover bids, for the states do not directly infringe on the interests of other states. When other states are forced to adopt their own corporate takeover laws in order to preserve their attractiveness as states of incorporation it is more a result of healthy competition than hostility between states.

[217]*Compare* Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945) *and* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959), *with* South Carolina State H'wy Dep't v. Barnwell Bros., 303 U.S. 177 (1938), *and* Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pac. R.R. Co., 393 U.S. 129 (1968).

alleged burden on commerce and local benefit. The courts below identified one actual and several hypothetical effects of the Idaho law which would arguably burden interstate commerce.[218] The circuit court, however, discounted the speculative effects indulged in by the district court,[219] and relied heavily on the sole actual effect of the Idaho law—that its enforcement "*stopped* over 31 million dollars of interstate commerce."[220] This emphasis and reliance appears misplaced inasmuch as Great Western United Corp.'s tender offer was "stopped," and remained so, because of its failure and unwillingness to comply with the Idaho law after initially submitting to Idaho jurisdiction under that law. After receiving the Idaho comment letters and order to delay commencement of the tender offer[221] during the afternoon of Friday, March 25, 1977, GWU representatives made no attempt whatsoever to contact Idaho officials to attempt to negotiate or clarify requests for additional information. GWU's sole response to the Idaho request for additional information and order was the filing of this instant lawsuit at 9:00 A.M. on Monday, March 28, 1977. But under applicable commerce clause analysis the critical inquiry regards the costs and effects of *compliance* or attempts to comply with the challenged state law—not the obviously more burdensome effects of *noncompliance*. If the effects of noncompliance were not more burdensome than the effects of compliance there would be no economic

[218]Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1283-84 (5th Cir. 1978) (J.S. App. A-54-A-55); Great Western United Corp. v. Kidwell, 439 F.Supp. 420, 438-39 (N.D. Tex. 1977) (J.S. App. A-124-A-125).

[219]577 F.2d at 1284, 1286 n. 59 (J.S. App. A-66, A61 n. 59).

[220]*Id.* at 1284 (J.S. App. A-55) (emphasis by the court).

[221]Plaintiff's Exhibits 4 & 5 (A. 77-87).

incentive to alter behavior. Though the circuit court noted that a GWU official testified that "the company doubted it could ever satisfy Idaho's requirements,"[222] GWU Executive Vice-President Boswell actually testified: "We just reached a determination that we might not ever be able to adequately respond to the [comment] letter."[223] Notwithstanding the subtle difference between what was actually said and how the court interpreted it, the fact remains that Mr. Boswell's conclusion is entitled to no evidentiary weight[224] inasmuch as GWU never even *attempted* to comply with Idaho's requests, and the question which prompted the response, as well as all other testimony, related to no direct inquiry of what specific requests would be difficult to meet. As one author cogently notes: "Indeed, if the effects of noncompliance were typically balanced against the bene-

[222]577 F.2d at 1284 (J.S. App. A-55).

[223]Testimony of Mr. Boswell (Trial Tr., 156).

[224]This same individual, G. Michael Boswell, is currently President and a Director of Sunshine Mining Co., the target company of GWU's takeover bid herein, and in such capacity, on the 1st day of January 1979, verified a Complaint in an action brought by Sunshine Mining Co. against Great Western United Corp., and others, in the District of Idaho alleging inter alia that GWU and the other defendants have defrauded Sunshine and its shareholders in connection with a settlement agreement that emerged from the initial takeover proposal which precipitated this instant litigation. Sunshine Mining Co. v. Hunt International Resources Corp., Great Western United Corp., Ivan L. Bielenberg & Western Investment Co., Civil Action No. CIV 78 1323 (U.S.D.C., D. Idaho 1979), First Amended Complaint at 2, 47. The essential thrust of the Sunshine complaint is that GWU and others made untrue and fraudulent representations in achieving a settlement of litigation in Idaho involving the proposed Sunshine takeover and have failed to live up to the terms of that agreement. The representation by Boswell as an officer of GWU that his company "might not ever" be able to comply with the requests in the Idaho comment letter is particularly suspect in light of Boswell's current posture as an officer of Sunshine that GWU made untrue representations and perpetrated fraud in connection with settlement of takeover litigation in Idaho.

fits of state regulation, it would be a rare state statute that survived the commerce clause test."[225]

Certainly the strong Idaho interest in shareholder protection more than outweighs the slight additional costs which GWU would have had to bear by compliance with the Idaho law. And these strong state interests should be upheld "even though the state action may have repercussions beyond state lines."[226]

VI

A TENDER OFFEROR DOES NOT HAVE STANDING UNDER THE WILLIAMS ACT TO CHALLENGE THE CONSTITUTIONALITY OF STATE CORPORATE TAKEOVER LAWS

Though this Court amply and at length reviewed the legislative history of the Williams Act in *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), and concluded that a tender offeror suing in its capacity as a takeover bidder does not have standing to sue for damages, the Court left open for another day the question whether a tender offeror has

[225]Note, *The Constitutionality of State Takeover Statutes: A Response to* Great Western, 53 N.Y.U. L. Rev. 872, 923 (1978). Consider, for example, the full-crew cases in which this Court upheld against commerce clause challenges the right of states to prescribe minimum train crews for interstate railroads passing through the state. *See, e.g.* Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pac. R.R. Co., 393 U.S. 129, 140-42 (1968); Missouri Pac. R.R. Co. v. Norwood, 283 U.S. 249, 254-56 (1931). Would the same result obtain if the Court had focused on the burden of noncompliance with the law—effective preclusion of the interstate railroad from the regulating state—rather than the burden of compliance—merely some additional expense to the railroad.

[226]Traveler's Health Ass'n v. Virginia, 339 U.S. 643, 647 (1950) (*quoting* Osborne v. Ozlin, 310 U.S. 53, 62 (1940)). The allowed activity in these cases involved commercial activity; certainly no less a standard should apply to governmental activity by state officials.

standing to sue under the Williams Act for injunctive relief.[227] The day may well have arrived.

Initially, it must be emphasized that GWU never really became a tender offeror or takeover bidder at the time it brought this instant action. The action was filed as a result of an order from an Idaho official effectively delaying the commencement of GWU's proposed tender offer. In this context, the dispute herein assumes overtones synonymous with the facts of *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), in which this Court decided that a person who is not a purchaser or seller of securities, but is merely a potential purchaser or seller, does not have standing to bring an action under section 10(b) of the Securities Exchange Act of 1934 or SEC Rule 10b-5. Here, Great Western United Corp. was a potential tender offeror and takeover bidder, but at the time it filed suit was not an *actual* tender offeror or takeover bidder.

Moreover, as the Court's *Piper* analysis points out, the Williams Act was designed for shareholder protection, not to create a federally-protected right to make a takeover bid. Though GWU is a shareholder of the target company, Sunshine Mining Co., of the proposed takeover bid, it is not in that capacity that this instant action was brought.

Since the Williams Act is designed exclusively for shareholder protection, litigation under the Williams Act should be limited to that class of plaintiffs, and a potential or actual tender offeror or takeover bidder should not have standing to maintain an action under the Act's aegis.

[227]430 U.S. at 42 n. 28.

VII

WAYNE L. KIDWELL (NOW DAVID H. LEROY) SHOULD NOT BE DISMISSED AS A PARTY APPELLANT

Appellee correctly points out to the Court, as noted by the court of appeals,[228] that Idaho Attorney General Kidwell, though a party in the district court action, did not appeal. Were the circuit court decision not replete with references in the plural to Idaho "officials" and actions by the same, concluding by an affirmance of the decision of the district court below, the issue would seem foreclosed. Yet, as the circuit court saw fit to include the Idaho Attorney General in its appellate considerations and its decision without a formal appeal by him and to affirm a decision against him by the district court, it seemed only fitting, proper, and equitable for the Idaho Attorney General formally to appeal along with his co-defendant to this Court for ultimate resolution of this matter which has so long involved him even though he has acted throughout the course of the complained-of takeover activity in a wholly passive manner.

Accordingly, Appellants have taken the unusual measure of filing Notice of Appeal with both the United States Court of Appeals for the Fifth Circuit[229] and the United States District Court for the Northern District of Texas, Dallas Division.[230]

Since the jurisdictional issues herein, particularly, involve the Idaho Attorney General and his ability to administer Idaho law without the chilling spectre of being called to a host of out-of-state courts to defend the constitutional-

[228] 577 F.2d at 1261 n. 1 (J.S. App. A-2).
[229] (J.S. App. A-126-A-127).
[230] (J.S. App. A-128-A-129).

ity of Idaho laws, Appellant Idaho Attorney General Wayne L. Kidwell (now represented as a party by his successor in office David H. Leroy) should be retained as a party Appellant before this Court.

CONCLUSION

The judgments below by both the district court and circuit court of appeals should be reversed because:

1. Appellee did not have the requisite standing to bring this action;

2. Appellants were not subject to subject matter jurisdiction under section 27 of the Securities Exchange Act of 1934 through section 28(a) thereof;

3. Appellants were not subject to personal jurisdiction of the United States District for the Northern District of Texas;

4. Venue was improperly placed in the Northern District of Texas; and

5. The Idaho Corporate Take-Over Law is not unconstitutional inasmuch as it is not either:

(i) preempted by (under the Supremacy Clause), or

(ii) an undue burden on the Commerce Clause of the United States Constitution.

This case involves threshold issues which, if resolved in Appellants' favor, as they should be, could cause this Court to fail to reach the merits of the constitutional challenge to the state corporate takeover law. Appellants urge, however, that the issues of the merits herein are so inextricably intertwined with the jurisdictional issues that a disposition on jurisdictional grounds should include some indication of the role played by the merits. There is classic precedent

for such an action from *Marbury v. Madison*, 1 Cranch. (5 U.S.) 138 (1803). Moreover, though the constitutional issues on the merits of state takeover laws vis-a-vis federal law in the cash tender offer field have been written about by numerous authors, were the subject of the National Moot Court Competition in 1976, and have been the subject of a significant number of lawsuits prior to and since this instant action (all of which have either been settled prior to judgment or not appealed),[231] this instant action

[231]There has been a plethora of law review articles on the subject of the constitutionality of state corporate takeover laws and their relationship to federal law, as well as discussion of this dilemma in several texts on the subject of tender offers. Many of these are already cited and referred to herein; others will no doubt be cited and discussed by Appellee.

Several lawsuits were instituted prior to this instant action to challenge constitutionality of state takeover laws, but none resulted in definitive judgments. *See, e.g.* United Technologies Corp. v. Hafsten, No. IP 75-602-C (S.D. Ind. 1975); Ohio v. Imetal, No. 75 CV 09-3868 (C.P. Franklin Cty., Ohio, filed Oct. 9, 1975); Thrall Car Mfg. Co.; Youngstown Steel Door Co., Ohio Dep't of Commerce, Div. of Securities, File No. 041-10 (Aug. 2, 1976). Since this instant action, there has been even more litigation of the constitutional issues, but due to the volatile nature of takeover bids and usual appearance of a competitor or final resolution of the underlying dispute none have reached a level where the possibility or desirability of appeal or petition to this Court occurred. *See, e.g.* Occidental Petroleum Corp. v. Hurd, No. C-3-78-100 (S.D. Ohio 1978); Dart Indus., Inc. v. Conrad, No. P 78-709-C (S.D. Ind. 1978); Flynn v. Bass Brothers. Enterprises, Inc., 456 F.Supp. 484 (E.D. Pa. 1978); Roussell v. Boren, No. CIV 78-2345 (E.D. La. 1978) (challenges state ins. co. holding act on *Kidwell* grounds); S-G Securities, Inc. v. The Fuqua Investment Co., No. CIV 78-2392-S (D. Mass. 1978) (creeping tender offer). Yet other cases involve situations where takeover bidders have complied with state law but reserved the right to challenge its constitutionality in the future. *See, e.g.* Daylin v. Fratkin, No. CIV 79-161 (E.D. Pa. 1979). And it is now common practice to insert "boilerplate" language either in the tender offer or the 14D disclosure statement filed with the SEC explicitly reserving the right to challenge the constitutionality of any allegedly applicable state takeover laws. *See, e.g.* Offer for Daylin by W.R. Grace Co., Jan. 26, 1979; Offer for Comten by NCR Systems, Inc., Jan 22, 1979 (both with reservations in the offer); and Schedule 14D-1 in Offer for Washington Steel Co. by TW Corp., a subsidiary of Talley Indus., Inc., Feb. 1979.

stands alone as the sole case in the ten years since passage of the Williams Act that has reached a full decision on the merits at the appellate level—and because of the volatility of takeover bids it is likely to remain the only case in which these constitutional issues are framed so that this Court may resolve the dilemma which so seriously affects the commercial context of cash tender offers for corporate control.[232]

Respectfully submitted,

PETER E. HEISER, JR.
SPECIAL DEPUTY ATTORNEY
GENERAL OF IDAHO
Counsel for Appellants.

February 22, 1979.

(Appendix Follows)

[232]In a letter dated April 19, 1976 (commenting on Senate Bill 2522 designed to amend the Securities Exchange Act to provide disclosure about persons intending to make a tender offer), then SEC Chairman Roderick M. Hills said to Senator Proxmire:

> Significantly, the propriety of such state [takeover] legislation is extremely difficult to challenge in court because of the time within which a tender offer must, as a practical matter, be completed. Judicial resolution of this question in a particular case would require a substantial period of time of obtain.

Reported in Subcomm. on Proxy Solicitations and Tender Offers, Federal Regulation of Securities Comm., *State Takeover Statutes and the Williams Act*, 32 BUS. LAW. 187, 192 (1976). And, as noted by leading text authors:

> [I]t is unlikely that the constitutionality of these [state] statutes will be readily and definitively resolved by the courts in the near future. Because tender offers, by their nature, must proceed rapidly in order to be successful, few, if any, tender offerors are willing or able to engage in the protracted legal proceedings necessary to have a state tender offer statute declared unconstitutional. Even if tender offerors choose or are obligated to raise the issue of the unconstitutionality of state tender offer statutes, the need for speedy resolution of tender offers is likely to create pressure that can only lead to settlement of those disputes prior to the issuance of a definitive judicial decision.

E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 233 (1977).

APPENDIX

15 U.S.C. § 78m(d, e) (1970)

(d)(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78*l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78*l*(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds

is a loan made in the ordinary course of business by a bank, as defined in section 78c(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as

necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(6) The provisions of this subsection shall not apply to—

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933;

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisition by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

(C) any acquisition of an equity security by the issuer of such security;

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e) (1) It shall be unlawful for an issuer which has a class of equity securities registered pursuant to section 78*l* of this title, or which is a closed-end investment company registered under the Investment Company Act of 1940, to purchase any equity security issued by it if such purchase is in contravention of such rules and regulations as the Commission, in the public interest or for the protection of investors, may adopt (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices. Such rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purchase, the source of funds, the numbers of shares to be purchased, the price to be paid for such se-

curities, the method of purchase, and such addition information, as the Commission deems necessary or appropriate in the public interest or for the protection of investors, or which the Commission deems to be material to a determination whether such security should be sold.

(2) For the purpose of this subsection, a purchase by or for the isuer or any person controlling, controlled by, or under common control with the issuer, or a purchase subject to control of the issuer or any such person, shall be deemed to be a purchase by the issuer. The Commission shall have power to make rules and regulations implementing this paragraph in the public interest and for the protection of investors, including exemptive rules and regulations covering situations in which the Commission deems it unnecessary or inappropriate that a purchase of the type described in this paragraph shall be deemed to be a purchase by the issuer for purposes of some or all of the provisions of paragraph (1) of this subsection.

15 U.S.C. § 78n(d-f) (1970)

(d) (1) It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 78*l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78*l*(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Com-

pany Act of 1940, if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in section 78m(d) of this title, and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors, and shall be filed with the Commission not later than the time copies of such material are first published or sent or given to security holders. Copies of all statements, in the form in which such material is furnished to security holders and the Commission, shall be sent to the issuer not later than the date such material is first published or sent or given to any security holders.

(2) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for purposes of this subsection.

(3) In determining for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(4) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(5) Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors.

(6) Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be

pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders.

(7) Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

(8) The provisions of this subsection shall not apply to any offer for, or request or invitation for tenders of, any security—

(A) if the acquisition of such security, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, would not exceed 2 per centum of that class;

(B) by the issuer of such security; or

(C) which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

(f) If, pursuant to any arrangement or understanding with the person or persons acquiring securities in a transaction subject to subsection (d) of this section or subsection (d) of section 78m of this title, any persons are to be elected or designated as directors of the issuer, otherwise than at a meeting of security holders, and the persons so elected or designated will constitute a majority of the directors of the issuer, then, prior to the time any such person takes office as a director, and in accordance with rules and regulations prescribed by the Commission, the issuer shall file with the Commission, and transmit to all holders of record of securities of the issuer who would be entitled to vote at a meeting for election of directors, information substantially equivalent to the information which would be required by subsection (a) or (c) of this section to be transmitted if such person or persons were nominees for election as directors at a meeting of such security holders.

Idaho Code §§ 30-1501 to 30-1513

CHAPTER 15

Corporate Take-Overs

30-1501: Definitions.—When used in this chapter, unless the context otherwise requires:

(1) "Director" means the director of the department of finance.

(2) "Equity security" means any shares of stock or similar securities, or any securities convertible into such securities, or carrying any warrant or right to subscribe to or purchase such securities, or any such warrant or right, or any other security which, for the protection of investors, is deemed an equity security pursuant to rule of the director.

(3) "Offeror" means a person who makes or in any way participates in making a take-over offer, and includes all affiliates and associates of that person, and all persons acting jointly or in concert for the purpose of acquiring, holding or disposing of or exercising any voting rights attached to the equity securities for which a take-over offer is made. "Offeror" does not include any bank or broker-dealer loaning funds to an offeror in the ordinary course of its business, or any bank, broker-dealer, attorney, accountant, consultant, employee, or other person furnishing information or advice to or performing ministerial duties for an offeror, and not otherwise participating in the take-over offer.

(4) "Offeree" means the beneficial owner of equity securities which an offeror acquires or offers to acquire in connection with a take-over offer.

(5) "Take-over offer" means the offer to acquire or the acquisition of any equity security of a target company, pursuant to a tender offer or request or invitation for tenders, if after the acquisition thereof the offeror would be directly or indirectly a beneficial owner of more than five per cent (5%) of any class of the outstanding equity securities of the issuer. "Take-over offer" does not include an offer or acquisition of any equity security of a target company pursuant to:

(a) Brokers' transactions effected by or through a broker-dealer in the ordinary course of its business.

(b) An exchange offer for securities of another issuer, if the offer is exempted from registration or is registered under chapter 14, title 30, Idaho Code, and does not involve any public offering under the Securities Act of 1933.

(c) An offer made to not more than ten (10) persons in this state during any period of twelve (12) consecutive months.

(a) An offer made to all the stockholders of the target company, if the number of its stockholders does not exceed one hundred (100) at the time of the offer.

(e) An offer as to which the target company, acting through its board of directors, recommends acceptance to its stockholders, if the offer is made to all stockholders on substantially equal terms.

(f) An offer if the acquisition of any equity security pursuant thereto, together with all other

acquisitions by the offeror of securities of the same class during the preceding twelve (12) months, would not exceed two per cent (2%) of that class of the outstanding equity securities of the issuer.

(g) An offer by the target company to acquire its own equity securities.

(6) "Target company" means a corporation or other issuer of securities which is organized under the laws of this state or has its principal office in this state, which has substantial assets located in this state, whose equity securities of any class are or have been registered under chapter 14, title 30, Idaho Code, or predecessor laws or section 12 of the Securities Exchange Act of 1934, and which is or may be involved in a take-over offer relating to any class of its equity securities. [I.C., § 30-1501, as added by 1975, ch. 248, § 1, p. 662.]

30-1502. Filing of ownership information.—(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a target company, is directly or indirectly a beneficial owner of more than five per cent (5%) of any class of the outstanding equity securities of the issuer shall, within ten (10) days after such acquisition, file with the director on a form prescribed by him a statement containing the following information and such additional information as the director by rule prescribes:

(a) The identity and background of all persons on whose behalf the acquisition of any equity security of the target company has been or is to be effected.

(b) The source and amount of funds or other consideration used or to be used in acquiring any equity security, including a statement describing any securities which are being offered in exchange for the equity securities of the target company, and if any part of the acquisition price is or will be represented by borrowed funds or other consideration, a description of the transaction and the names of the parties thereto.

(c) If the purpose of the acquisition is to gain control of the target company, a statement of any plans or proposals which such person has, upon gaining control, to liquidate the target company, sell its assets, effect its merger or consolidation or make any other major change in its business, corporate structure, management or personnel.

(d) The number of shares or units of any equity security of the target company of which each such person and each associate of such person and each person included as an offeror is the beneficial owner or which each such person has a right to acquire, directly or indirectly, together with the name and address of each such person.

(e) Material information as to any contracts, arrangements or understandings with any person with respect to any equity security of the target company, including transfers of any equity security, joint ventures, loan or option arrangements, puts and calls, guarantees of loan, guarantees against loss, guaranties or profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with

whom such contracts, arrangements or understandings have been entered into.

(2) If the target company is an issuer the acquisition of whose equity securities is subject to the requirements of section 13(d) of the Securities Exchange Act of 1934, any person may file with the director a signed copy of the statement prescribed therein in lieu of the statement prescribed in section 30-1502(1), Idaho Code.

(3) Any person may file with the director, in lieu of the statement prescribed in section 30-1502(1), Idaho Code, and unless otherwise ordered by the director, a statement containing his name and address, the number of shares or units of any equity security of the target company which are beneficially owned directly or indirectly by him and each of his associates, the date of their acquisition and such other information as the director may by rule prescribe, if he certifies that such securities were acquired by him, in the ordinary course of his business and not for the purpose or having the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect, and that he does not intend to make a take-over offer involving the target company.

(4) If any material change occurs in the facts set forth in the statement, the person filing the statement shall, within ten (10) days thereafter, file with the director an amendment describing the change, in accordance with such rules as the director prescribes.

(5) Each person required to file any statement or amendment thereto with the director under this section

shall send a signed copy of such statement or amendment by certified mail to the target company at its principal office not later than the date of filing.

(6) No person required to file any ownership statement under this section, who is delinquent in the filing of such statement, may file a registration statement relating to a proposed take-over for a period of sixty (60) days after the date of filing of the ownership statement, except as may be permitted by order of the director. [I.C., § 30-1502, as added by 1975, ch. 248, § 1, p. 662.]

30-1503. Registration of take-over offers.—(1) It is unlawful for any person to make a take-over offer involving a target company in this state, or to acquire any equity securities of a target company pursuant to the offer, unless the offer is effective under this chapter or is exempted by rule or order of the director. Before a take-over offer becomes effective under this chapter, the offeror shall file with the director a registration statement containing the information prescribed in section 30-1503(2), Idaho Code, and send a copy of the registration statement by certified mail to the target company at its principal office and publicly disclose the material terms of the proposed offer, not later than the date of filing of the registration statement.

(2) The registration statement shall be filed on forms prescribed by the director, and shall be accompanied by a consent by the offeror to service of process specified in section 30-1436, Idaho Code, and the filing fee specified in section 30-1508, Idaho Code, and shall contain the following information and such additional information as the director by rule prescribes:

(a) All of the information specified in section 30-1502(1), Idaho Code, any part of which may be incorporated by reference to the extent that it was previously filed.

(b) Three (3) copies of the proposed take-over offer, including all material terms thereof, in the form proposed to be published or sent or delivered to security holders of the target company.

(c) Material information concerning the organization and operations of any offeror which is a corporation, including the year, form and jurisdiction of its organization, a description of each class of its capital stock and long-term debt, a description of the business done by the offeror and its subsidiaries and any material changes therein during the past three (3) years, a description of the location and character of the principal properties of the offeror and its subsidiaries, a description of any material pending legal or administrative proceedings in which the offeror or any of its subsidiaries is a party, the names of all directors and executive officers of the offeror and their material business activities and affiliations during the past three (3) years, and financial statements of the offeror for its three (3) most recent annual accounting periods and any current period.

(d) Material information concerning the identity and background of any offeror who is not a corporation, including his material business activities and affiliations during the past three (3) years, and a description of any material pending legal or administrative proceedings in which the offeror is a party.

(3) The director may require the offeror to file any other documents, exhibits and information that he deems material to the take-over offer, and he may permit the omission of any of the information specified in section 30-1503(2), Idaho Code, if he determines that such information is not required for the protection of offerees. The director may by order summarily delay the effective date of the offer if he determines that the registration statement does not contain all of the information specified in section 30-1503(2), Idaho Code, or does not provide full disclosure to offerees of all material information concerning the offer.

(4) A take-over offer becomes effective when approved by the director. The director may call a hearing if he deems it necessary or appropriate for the protection of offerees in this state, and shall call a hearing if so requested by the target company, acting through its board of directors. If a hearing is called, the offer shall not become effective until registered by order of the director.

(5) Any hearing called by the director under this section shall be held within twenty (20) days of the date of filing of the registration statement under section 30-1503(1), Idaho Code, and any determination made following the hearing shall be made within thirty (30) days after such filing, unless extended by order of the director for the convenience of the parties or for the protection of offerees in this state. If, the following the hearing, the director finds that the take-over offer fails to provide for full disclosure to offerees of all material information concerning the offer, or will not be made to all stockholders on substantially equal terms or is in violation of chapter 14, title 30, Idaho

Code, he shall by order deny registration of the offer. Registration of the offer is not deemed approval of the offer by the director. [I.C., § 30-1503, as added by 1975, ch. 248, § 1, p. 662.]

30-1504. Filing of solicitation materials.—(1) Copies of all advertisements, circulars, letters or other materials published by the offeror or the target company, soliciting or requesting the acceptance or rejection of the take-over offer, shall be filed with the director and sent to the target company or offeror, respectively, not later than the time copies of such solicitation materials are first published or used or sent to security holders of the target company.

(2) Solicitation materials used in connection with a take-over offer shall not contain any false statement of a material fact or omit to state a material fact necessary to make the statement therein not misleading. The director may by rule or order prohibit the use of any solicitation materials deemed false or misleading. [I.C., § 30-1504, as added by 1975, ch. 248, § 1, p. 662.]

30-1505. Fraudulent and deceptive practices.—It is unlawful for any offeror or target company or any controlling person of an offeror or target company or any broker-dealer acting on behalf of an offeror or target company to engage in any fraudulent, deceptive or manipulative acts or practices in connection with a take-over offer. Fraudulent, deceptive and manipulative acts or practices include, without limitation:

(1) Publication or use in connection with the offer of any false statement of a material fact or omitting to state a material fact necessary to make the statements made by him not misleading, but not including the mailing by a target company to its stockholders of solicitation materials published by an offeror.

(2) Sale by any controlling stockholders of a target company in connection with a take-over offer of all or part of their equity securities to the offeror at a price higher than that to be paid other stockholders pursuant to the offer.

(3) Refusal by a target company to permit an offeror who is a stockholder of record to examine its list of stockholders, and to make extracts therefrom, pursuant to the applicable corporation statute, for the purpose of making a take-over offer in compliance with this chapter.

(4) Acquisition by or through a broker-dealer acting on behalf of an offeror of any equity security of the target company in connection with a take-over offer unless the broker-dealer files with the director such information as he requires and to the extent permitted by rule or order by the director, or unless the broker-dealer did not know and in the exercise of reasonable care could not have known that the person for whom it acted was an offeror or that the acquisition was in connection with a take-over offer. [I.C., § 30-1506, as added by 1975, ch. 248, § 1, p. 662.]

30-1506. Limitations on offerors.—(1) No offeror may make a take-over offer involving a target company which is not made to all its stockholders in this state, or which is not made to stockholders in this state on substantially the same terms as the offer is made to stockholders outside this state.

(2) An offeror shall provide that any equity securities of a target company deposited or tendered pursuant to a take-over offer may be withdrawn by or on behalf of any offeree at any time within seven (7) days from the date the offer has become effective under this chapter and after sixty (60) days from the date the offer has become effective under this chapter, except as the director may otherwise prescribe by rule or order for the protection of investors.

(3) If an offeror makes a take-over offer for less than all the outstanding equity securities of any class, and if the number of securities deposited or tendered pursuant thereto within ten (10) days after the offer has become effective under this chapter and copies of the offer, or notice of any increase in the consideration offered, are first published or sent or given to security holders is greater than the number the offeror has offered to accept and pay for, the securities shall be accepted pro rata, disregarding fractions, according to the number of securities deposited or tendered by each offeree.

(4) If an offeror varies the terms of a take-over offer before its expiration date by increasing the consideration offered to security holders, the offeror shall pay the increased consideration for all equity securities accepted, whether such securities have been accepted by the offeror before or after the variation in the terms of the offer.

(5) No offeror may make a take-over offer involving a target company, or acquire any equity securities of a target company pursuant to the offer, at any time when an administrative or injunctive proceeding has been brought by the director against the offeror for violation of this chapter that has not been finally determined.

(6) No offeror may acquire, remove or exercise control, directly or indirectly, over any assets of a target company located in this state in connection with a take-over offer unless the take-over offer is effective or exempt under this chapter, except as permitted by order of the director. [I.C., § 30-1506, as added by 1975, ch. 248, § 1, p. 662.]

30-1507. Administration, rules and orders.—(1) This chapter shall be administered by the director of the department of finance, who may exercise all powers granted to him under chapter 14, title 30, Idaho Code, which are not inconsistent with this chapter.

(2) The director may make rules necessary to carry out the purposes of this chapter, including, without limitation, the definition of terms used in this chapter.

(3) The director may by rule or order exempt from any provisions of this chapter take-over offers that he determines are not made for the purpose or do not have the effect of changing or influencing the control of a target company or where compliance with this chapter is not necessary for the protection of the stockholders of the target company, and he may similarly exempt any persons from the filing of statements under this chapter.

(4) The director may by order direct any person to file any statement provided for in this chapter if it appears that such person is required to file such statement and is delinquent in the filing of such statement. [I.C., § 30-1507, as added by 1975, ch. 248, § 1, p. 662.]

30-1508. Fees and expenses.—(1) For each registration statement filed by an offeror, the offeror shall pay a filing fee based upon the cost to the department of finance to

examine and evaluate the registration statement in accordance with the schedules adopted by the director. The schedules adopted by the director shall be designed to assure that the fees collected shall be sufficient to cover the cost of administering this act.

(2) All of the expenses reasonably attributable to any hearing held under this chapter shall be charged ratably to the offeror and the target company but the total amount charged shall not exceed one thousand five hundred dollars ($1,500). [I.C., § 30-1508, as added by 1975, ch. 248, § 1, p. 662.]

30-1509. Injunctions.—Whenever it appears to the director that any person, including a controlling person of an offeror or target company, has engaged or is about to engage in any act or practice constituting a violation of this chapter or any rule or order hereunder, he may bring an action in the name of the state in any court of competent jurisdiction to enjoin the acts or practices and to enforce compliance with this chapter or any rule or order hereunder, or he may refer the matter to the attorney general or the proper prosecuting attorney. Upon a proper showing, the court may grant a permanent or temporary injunction or restraining order or may order rescission of any sales or purchases of securities determined to be unlawful under this chapter or any rule or order hereunder. The court may not require the director to post a bond. [I.C., § 30-1509, as added by 1975, ch. 248, § 1, p. 662.]

30-1510. Criminal penalties.—(1) Any person, including a controlling person of an offeror or target company, who wilfully violates this chapter or any rule under this chapter, or any order of which he has notice, may be fined not

more than five thousand dollars ($5,000) or imprisoned not more than three (3) years or both. Each of the acts specified shall constitute a separate offense and a prosecution or conviction for any one of such offenses shall not bar prosecution or conviction for any other offense. No indictment or information may be returned under this chapter more than three (3) years after the alleged violation.

(2) The director may refer such evidence as is available concerning violations of this chapter or of any rule or order hereunder to the attorney general or the proper prosecuting attorney who may, with or without reference, institute the appropriate criminal proceedings under this chapter. If referred to a prosecuting attorney, he shall within ninety (90) days file with the director a statement concerning any action taken or, if no action has been taken, the reasons therefor.

(3) Nothing in this chapter limits the power of the state to punish any person for any conduct which constitutes a crime under any other statute. [I.C., § 30-1510, as added by 1975, ch. 248, §1, p. 662.]

30-1511. Civil liabilities.—(1) Any offeror who purchases a security in connection with a take-over offer not in compliance with this chapter or by means of an untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, shall be liable to the person selling the security to him, who may sue either at law or in equity to recover the security, plus any income received by the

purchaser thereon, upon tender of the consideration received, or for damages. Damages are the excess of either the value of the security on the date of purchase or its present value, whichever is greater, over the present value of the consideration received for the security. Tender requires only notice of willingness to pay the amount specified in exchange for the security. Any notice may be given by service as in civil actions or by certified mail to the last known address of the person liable.

(2) Every person who directly or indirectly controls a person liable under section 30-1511(1), Idaho Code, every partner, principal executive officer or director of such person, every person occupying a similar status or performing similar functions, every employee of such person who materially aids in the act or transaction constituting the violation, and every broker-dealer or agent who materially aids in the act or transaction constituting the violation, is also liable jointly or severally with and to the same extent as such person, unless the person liable hereunder proves that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

(3) No action may be maintained under this section unless commenced before the expiration of three (3) years after the act or transaction constituting the violation.

(4) The rights and remedies under this chapter are in addition to any other rights or remedies that may exist at law or in equity. [I.C., § 30-1511, as added by 1975, ch. 248, § 1, p. 662.]

30-1512. Application of chapter.—(1) If the target company is an insurance company subject to regulation by the director of the department of insurance, a banking corporation subject to regulation by the director of the department of finance, a savings and loan association subject to regulation by the director of the department of finance, or a public utility subject to regulation by the public utilities commission, the director shall promptly furnish a copy of the registration statement filed under this chapter to the regulatory agency having supervision of the target company. Any hearing under this chapter involving any such target company shall be held jointly with the regulatory agency having supervision, and any determination following the hearing shall be made jointly with that regulatory agency.

(2) If the target company is a public utility, public utility holding company, national banking association, bank holding company or savings and loan association subject to regulation by a federal agency and the take-over of such company is subject to approval by that agency, this chapter shall not apply.

(3) This chapter shall not apply to any offer involving a class vote by stockholders of the target company, pursuant to its articles of incorporation or the applicable corporation statute, on a merger, consolidation or sale of corporate assets in consideration of the issuance of securities of another corporation, or sale of its securities in exchange for cash or securities of another corporation. [I.C., § 30-1512, as added by 1975, ch. 248, § 1, p. 662.]

30-1513. Application of securities law.—All of the provisions of chapter 14, title 30, Idaho Code, which are not in conflict with this chapter shall apply to any take-over offer involving a target company. [I.C., § 30-1513, as added by 1975, ch. 248, § 1, p. 662.]

FOR ARGUMENT

Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM 1978

No. 78-759

DAVID H. LEROY, Attorney General of Idaho, and TOM D. MCELDOWNEY, Director of the Department of Finance of the State of Idaho,

Appellants,

v.

GREAT WESTERN UNITED CORPORATION,

Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE APPELLEE

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Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972) 52

Los Angeles Fisheries v. Crook, 47 F.2d 1031 (5th Cir. 1931) 38

McBreen v. Iceco, Inc., 12 Ill. App.2d 372, 139 N.E.2d 845 (1956) 38

McGee v. International Life Insurance Co., 355 U.S. 200 (1957) 63

McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944) 102

Maney v. Ratcliff, 399 F.Supp. 760 (E.D. Wis. 1975) 60, 61, 68

Mariash v. Morrill, 496 F.2d 1138 (2d Cir. 1974) 51

Maricopa County v. American Petrofina, Inc., 322 F.Supp. 467 (N.D. Cal. 1971) 58

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Mayer v. Development Corp. of America, 396 F.Supp. 917 (D. Del. 1975) 65

Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117 (1973) 76

Merrick v. Halsey & Co., 242 U.S. 568 (1917) 37, 73

Mite Corporation v. Dixon, 79 C 200 (N.D. Ill. Feb. 2, 1979) 93

Mississippi Pub. Corp. v. Murphree, 326 U.S. 438 (1946) 50

Nevada v. Hall, 47 U.S.L.W. 4261 (Mar. 5, 1979) 35, 42, 43

New York Central R. R. Co. v. Winfield, 244 U.S. 147 (1917) 84

Nicholson File Co. v. H. K. Porter Co., 341 F.Supp. 508 (D. R.I. 1972), *aff'd*, 482 F.2d 421 (1st Cir. 1973) 11

Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944) 96

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Pacific Employers Insurance Co. v. Industrial Accident Commission, 306 U.S. 493 (1939) 35

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Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974) 54, 57, 58

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Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 40

Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978) 101

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Spielman v. General Host Corp., 402 F.Supp. 190 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 39 (2d Cir. 1976) 11

State v. McCormick, 273 N.W.2d 624 (Minn. 1978) 33, 34

State ex rel Sperandio v. Clymer, 568 S.W. 2d 935 (Mo. 1978) 59

State Bd. of Insurance v. Todd Shipyards, 370 U.S. 451 (1962) 74

Stern v. Gobeloff, 332 F.Supp. 909 (D. Md. 1971) 51

Sunshine Mining Co. v. Great Western United Corp., (1977-78 TRANSFER BINDER) FED. SEC. L. REP. (CCH) ¶ 96,049 4

Susquehanna Corp. v. Pan American Sulphur Co., 423 F.2d 1075 (5th Cir. 1970) 11

Swift & Co. v. Wickham, 230 F.Supp. 398 (S.D. N.Y. 1964), *appeal dismissed*, 382 U.S. 111 (1965), *aff'd on further consideration*, 364 F.2d 241 (2d Cir. 1966), *cert. denied*, 385 U.S. 1036 (1967) 71

Texas & Pacific Railway Co. v. Rigsby, 241 U.S. 35 (1916) 47

Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950) 63

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Turner v. Baxley, 354 F.Supp. 963 (D. Vt. 1972) 44, 45

Tyco Laboratories, Inc. v. Connelly, CA 79-265 T (D. Mass. Feb. 9, 1979) 93

U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760 (Tex. 1977) 54, 56

United States v. Union Pacific R.R., 98 U.S. 569 (1878) 50, 51

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United States Bond & Finance Corp. v. National Bldg. & Loan Assn. of America, 80 Utah 62, 12 P.2d 758 (1932) .. 38

Warren v. Bokum Resources, 433 F.Supp. 1360 (D. N.M. 1977) 66

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Wharton v. Roth, 263 F.Supp. 922 (E.D. N.Y. 1964) 64

Constitutions and Statutes

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Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451-1461 (1970) 85

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U.S. CONST. art. VI, § 2 (Supremacy Clause) 22, 26, 70 71, 93, 114

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17 C.F.R. § 240.14d-1(a) (1968) 95

17 C.F.R. § 240.14d-4 (1968) 95

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17 C.F.R. § 240.14(d)-4 (1977) 83, 91

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42 U.S.C. § 1983 42

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American Law Institute, Federal Securities Code (Proposed Official Draft, Mar. 15, 1978) § 1904(c) 104

E. ARANOW AND H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL (1973) 87, 92

E. ARANOW, H. EINHORN AND G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL (1977) 33, 72, 87, 90, 92, 109, 112

AUSTIN AND FISHMAN, CORPORATION IN CONFLICT: THE TENDER OFFER (1970) 87

3A BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § 6.09 (1978) 10

1A BLUE SKY L. REP. (CCH) ¶ 15,721 6

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1A BLUE SKY L. REP. (CCH) ¶ 23,385 15
2 BLUE SKY L. REP. (CCH) ¶ 35,663 13
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Comment, Federal Venue: Locating the Place Where the Claim Arose, 54 TEX. L. REV. 392 (1976) 69
FLETCHER, CYCLOPEDIA OF CORPORATIONS (1945 Rev. Vol. [now 1975 Rev. Vol.]) Sec. 6742 38
Hamilton, Some Reflections on Cash Tender Offer Litigation, 15 N.Y.L.F. 269 (1969) 97
Hearing on H.R. 14475 and S.510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess. 17 (1968) 80
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Hearings on S. Res. 84 (72d Cong.) and S.Res. 56 and S.Res. 97 (73d Cong.), pt. 15 Before the Senate Comm. on Banking and Currency on Stock Exchange Practices Under the National Securities Exchange Act of 1934, 73d Cong., 1st Sess 6577 (1933) 72, 77, 79, 80, 81, 82, 108
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Hirsch, Toward a New View of Federal Pre-emption, 1972 U. ILL. L.F. 515 (1972) 74
H.Rep. No. 85, 73d Cong., 1st Sess. 10 (1933) 38, 73

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H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968) 77
H.R. 14417, 89th Cong., 2d Sess (1966) 78
Langevoort, State Tender-Offer Legislation: Interests, Effects and Political Competency, 62 CORNELL L.REV. 213 (1977) 74, 87
1 M. LIPTON AND E. STEINBERGER, TAKEOVERS AND FREEZEOUTS 405 (1978) 18
I L. LOSS, SECURITIES REGULATION 30 (2d ed. 1961) 72
II L. LOSS, SECURITIES REGULATION 1044-45 (2d ed. 1961) 48
1 J. MOORE'S FEDERAL PRACTICE ¶ 0.142 [5.-2] at 1430, 1434 (2d ed. 1977) 67, 69
1 J. MOORE'S FEDERAL PRACTICE ¶ 0.142 [5.-2] at 1423-1435 (2d ed. 1974) 68
2 J. MOORE'S FEDERAL PRACTICE ¶ 4.25[5] at 1171-72, n. 16 (2d ed. 1977) 57
2 J. MOORE'S FEDERAL PRACTICE ¶ 4.41-1[2] (2d ed. 1977) 56
Moylan, State Regulation of Tender Offers, 58 MARQ. L. REV. 687 (1975) 104
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Pitt, Standing to Sue Under the Williams Act After *Chris-Craft*: A Leaky Ship on Troubled Waters, 34 BUS. LAW. 117 (1978) 73

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Rep. of Subcomm. on Proxy Solicitations and Tender Offers of the Fed. Reg. of Securities Comm., State Takeover Statutes and the Williams Act, reprinted in 32 BUS. LAW. 187, 193 (1976) 109
Richmond Times Dispatch, June 10, 1977 89
SEC Release No. 33-3844 1 FED. SEC. L. REP. (CCH) ¶ 3,520 (Oct. 8, 1957) 10
SEC Release Nos. 33-6022, 34-15548 and IC-10575, File No. S7-770 (17 C.F.R. Part 240) (Jan. 5, 1979) 95, 101
S. 2731, 89th Cong., 1st Sess. (1965) 78
S. Rep. No. 550, 90th Cong., 1st Sess. 4 (1967) 74, 77, 81
Sommer, Jr., The Ohio Take-Offer Act: What Is It?, 21 CASE W. RES.L.REV. 681 (1970) 104
Sowards and Mofsky, Corporate Takeover Bids: Gap in Federal Securities Regulation, 41 ST. JOHN'S L.REV. 499 (1967) 74
Thode, In Personam Jurisdiction; Article 2031b, the Texas "Long-Arm" Jurisdiction Statute; and the Appearance to Challenge Jurisdiction in Texas and Elsewhere, 42 TEX. L. REV. 279 (1964) 56
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Wall St.J., (Eastern ed.), Aug. 11, 1977, p. 10, col. 1 88
Wall St. J., Mar. 13, 1979, p. 28, col. 4 4
H. WILLIAMS, INTRODUCTION TO DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL xix (1977) 94
Wilner and Landy, The Tender Trap: State Takeover Statutes and Their Constitutionality, 45 FORDHAM L. REV. 1 (1976) 87, 97, 104, 113
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113 Cong. Rec. 24665 (1967) 80
115 Cong. Rec. 1578 (1969) 80
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In the

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-759

DAVID H. LEROY, Attorney General of Idaho, and TOM D. MCELDOWNEY, Director of the Department of Finance of the State of Idaho,

Appellants,

v.

GREAT WESTERN UNITED CORPORATION,

Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

The following statement supplements Appellants' statement of the case in order to correct inaccuracies and omissions therein.

The Tender Offeror and Target Company.

The tender offeror was Great Western United Corporation ("GWU"), a Delaware corporation, with its executive office in Dallas, Texas and controlled by residents of Dallas, Texas. GWU's securities are traded on the New York Stock Exchange and the Pacific Stock Exchange.

The target company was Sunshine Mining Company ("Sunshine"), a Washington corporation. The State of Washington had no state takeover statute. The common stock of Sunshine was listed and traded on the New York Stock Exchange (the "NYSE") and the Spokane Stock Exchange. The shareholders of Sunshine live throughout the United States; approximately 2.5% and 7% of Sunshine's shareholders resided in Idaho and Texas, respectively, during the relevant time period. (Pl. Ex. M-1, Pl. Ex. M-2, A. 35 to A. 36). Sunshine securities were not registered in Idaho.

At all relevant times, Sunshine had a corporate headquarters in Idaho and was engaged in the mining of silver through the operation of the Sunshine Mine in the Coeur d'Alene Mining District of Idaho. Sunshine was also engaged, through a subsidiary, Anchor Post Products, Inc., in the manufacture, sale and installation of coated steel, aluminum and wood fences, with a manufacturing facility in Baltimore, Maryland, and was also engaged in substantial business activities in the State of New York. (J.S. App., A-86).

On March 18, 1977, GWU purchased from Hecla Mining Company ("Hecla") and Silver Dollar Mining Company ("Silver Dollar") 335,070 shares (approximately 6%) of the stock of Sunshine. (J.S. App., A-87). In December 1976, Hecla and Silver Dollar had underwritten an unsuccessful proxy contest to oust Sunshine's management. GWU agreed that if it successfully gained control of Sunshine, subject to approval by Sunshine shareholders GWU would reimburse Hecla and Silver Dollar up to $200,000 for their proxy fight expenses. (A. 43 to A. 44).

On March 21, 1977, GWU announced its intention to make an interstate cash tender offer to purchase up to 2,000,000 shares of common stock of Sunshine for $15.75 per share. This price represented a premium over the recent pricing

history of Sunshine stock on the NYSE. (Pl. Ex. M-4, A. 55 to A. 56). Because the proposed tender offer was national in scope, and because the means and instrumentalities of interstate commerce were necessarily to be involved in the making of the proposed tender offer, GWU was required to comply with the provisions of the Securities Exchange Act of 1934 (the "1934 Act") governing corporate cash tender offers. 15 U.S.C. §§ 78l(i), 78m(d)-(e), 78n(d)-(f) (1970).

Proceedings Under the Williams Act.

Pursuant to the Williams Act amendments to the 1934 Act, and the rules promulgated thereunder, GWU was required to file and did file with the Securities & Exchange Commission (the "SEC") a Schedule 13D (currently Schedule 14D-1) containing specified information. That information included GWU's identity and background, the amount and source of the funds to be used to purchase Sunshine stock, the purpose of the transaction, any plans for liquidation, merger or other significant changes in business or corporate structure of Sunshine, the number of shares of Sunshine owned by GWU, and the details of any agreements with other parties concerning Sunshine shares.

Moreover Section 14(d) of the 1934 Act and the rules promulgated thereunder required the proposed interstate cash tender offer to be conducted in accordance with the substantive provisions of the Williams Act relating to withdrawal rights of shareholders within 7 days after the offer is made and after 60 days from the making of the offer and prorata purchases of shares in partial offers, and requiring that any increase in the offer price be paid to all tendering shareholders. GWU was further required to conduct the tender offer in compliance with the antifraud provisions of Section 14(e) of the 1934 Act.

But for the obstacles imposed by the state takeover statutes hereinafter described, GWU, in accordance with the regulatory scheme adopted by Congress, and administered by the SEC, could have commenced its interstate cash tender offer for stock of Sunshine on March 21, 1977, and shortly thereafter Sunshine shareholders could have commenced tendering their shares for cash.

On April 1, 1977, Sunshine instituted suit against GWU in the United States District Court for the District of Idaho, alleging deficiencies in the Schedule 13D filed pursuant to the Williams Act, but on April 22, 1977, that court held that GWU was in compliance with the requirements of the Williams Act, and denied the injunctive relief sought by Sunshine against the proposed interstate cash tender offer. *Sunshine Mining Co. v. Great Western Corp.*, (1977-78 Transfer Binder) FED. SEC. L. REP. (CCH) ¶ 96,049.[1]

Concurrent Proceedings in Idaho.

Approximately seven years after the adoption of the Williams Act, the State of Idaho enacted a corporate takeover law, IDAHO CODE §§ 30-1501 to 30-1511 (the "Idaho Act"), which became effective July 1, 1975. The Idaho Act

[1] That litigation was dismissed as a result of settlement between the parties on October 5, 1977. The settlement provided that GWU or its parent, Hunt International Resources Corporation ("HIRCO"), would pay $15.00 per share for tendered shares and, within 18 months, offer $15.00 per share for Sunshine shares not purchased in the tender offer. (J.S. App., A-10). Litigation was commenced by GWU and HIRCO against Sunshine in Texas and by Sunshine against GWU and HIRCO in Idaho over the terms of the settlement agreement. Moreover, HIRCO, on February 26, 1979, commenced a cash tender offer for the remaining Sunshine shares at $15.00 per share. Sunshine sought to enjoin the offer in New York for alleged disclosure deficiencies under the Williams Act. Sunshine also sought to enjoin the offer in Maryland for failure to comply with the Maryland Corporate Take-over Law, MD. CORP. & ASS'NS CODE ANN. §§ 11-901 to 908 (Cum. Supp. 1976), (the "Maryland Act"), and HIRCO sought to declare the Maryland Act unconstitutional. Wall St. J., March 13, 1979, at 28, col. 4. The offer was ultimately withdrawn by HIRCO on March 26, 1979.

provides, *inter alia*, that no tender offer may be made for a target company which is not made to all Idaho stockholders or which is not made to Idaho stockholders on substantially the same terms as the offer is made to stockholders outside of Idaho. Idaho Act, § 30-1506. Section 30-1501(6) of the Idaho Act defines a target company as a corporation which is organized in Idaho, or has its principal office in Idaho, or has substantial assets in Idaho, and whose equity securities are or have been registered under Idaho law or Section 12 of the 1934 Act.

Significantly, the presence or absence of target company shareholders in Idaho is irrelevant to the applicability of the Idaho Act.

Although Sunshine was not incorporated in Idaho, had relatively few shareholders in Idaho, and had not registered its securities with the State of Idaho, GWU was compelled to consider compliance with the Idaho Act because Sunshine's securities were registered with the SEC pursuant to Section 12 of the 1934 Act and because Sunshine had its corporate headquarters in Idaho and was engaged in the mining of silver through the operation of the Sunshine Mine in the Coeur d'Alene Mining District of Idaho.[2]

Before GWU could go forward with its interstate cash tender offer, the Idaho Act required GWU, among other things:

(a) To submit to the Idaho Director of the Department of Finance a pre-effective filing disclosing GWU's intention

[2] The Idaho Act provides for a fine of not more than $5,000 or imprisonment for not more than three years or both for each wilful violation of the Idaho Act or any rule thereunder. § 30-1510. In view of the extraterritorial reach of the Idaho Act, § 30-1506, GWU could not make the cash tender offer available to Sunshine shareholders anywhere in the world without risking fines, or imprisonment of its executives, or both.

to make a tender offer and the terms of that offer, §§ 30-1503(1)-(2);

(b) To transmit, at the same time, a copy of that filing to Sunshine, § 30-1503(1);

(c) To publish an advertisement describing the intention to make the offer and the proposed material terms, § 30-1503(1) and Definitions of the Rules and Regulations for Chapter 15 of the Idaho Statutes, The Idaho Corporate Take-over Law, ¶ 6, 1A BLUE SKY L. REP. (CCH) ¶ 15,721;

(d) To pay the Idaho registration fee, § 30-1508 (the fees range from $500 to $5,500);

(e) To participate in a hearing, which would be mandatory if Sunshine requested one, § 30-1503(4); and

(f) To delay its proposed interstate cash tender offer until made effective by the Idaho Director, § 30-1503(1) and (4), and until the final determination of any administrative or injunctive proceeding brought by the Director of the Department of Finance for violation of the Idaho Act, § 30-1506(5).

No time limitation is placed on when the Director must rule on the effectiveness of the registration statement, and, in fact, there is no statutory requirement that he rule at all; a takeover offer simply becomes effective when approved by the Director. Any hearing called by the Director (on his own or at the request of Sunshine) is to be held within 20 days of the filing of the registration statement. Idaho Act, § 30-1503(5). If a hearing is called by the Director on his own initiative or at the request of the target company, the offer does not become effective until registered by order of the Director, and the Director has unlimited right to extend any determination made following a hearing for the convenience of the parties or for the protection of offerees in Idaho. Idaho Act, § 30-1503(4)-(5). The Director is also

authorized by order to summarily delay the effective date of the offer if he determines that the registration statement is insufficient. Idaho Act, § 30-1503(3).

GWU's offer would not have been subject to any requirements under the Idaho Act if the terms had been accepted by Sunshine's Board of Directors and if the offer was made to all stockholders on substantially equal terms. Idaho Act, § 30-1501(5)(e).

At the outset, GWU attempted to comply with the requirements of the Idaho Act.

Prior to the March 21, 1977 announcement of the proposed tender offer, GWU obtained assurances from Melvin J. Baptie, Idaho's Deputy Administrator-Securities of the Department of Finance, that the disclosure requirements in Idaho would be substantially met through the filing of GWU's Schedule 13D. The Idaho Act, pursuant to § 30-1502(2), specifically authorizes informational filings pursuant to the 1934 Act in lieu of the information requirements of § 30-1502(1). The Idaho Act does provide for the filing of additional information, but grants to the Director the discretion to permit the omission of any such additional information if he determines that such information is not required for the protection of offerees. Idaho Act, § 30-1503(1), (2) and (3).

Based upon these assurances, and notwithstanding the belief held by GWU that the Idaho Act was unconstitutional, GWU, in a spirit of cooperation, attempted to comply with the Idaho Act by filing thereunder a registration statement consisting of the Schedule 13D filed with the SEC. (May 23, 1977 Trial Tr., pp. 140, 142-145, Testimony of G. Michael Boswell, Executive Vice President of GWU).

On March 25, 1977, Mr. Baptie transmitted to GWU's counsel in Texas, at his request, a comment letter seeking

substantial additional information from GWU over and above what was contained in the Schedule 13D and advising that should GWU decide not to file the requested information, the Idaho Director was prepared to call for a hearing on his own initiative and determine whether or not the March 21, 1977 filing contained sufficient disclosure. (A. 77 to A. 85). Accompanying this transmission was an Order summarily issued by Appellant McEldowney (without notice, hearing or the posting of any bond or other security) which, as determined by both courts below, effectively enjoined GWU's proposed interstate cash tender offer, not only in Idaho but in every state, for more than five months. (Pl. Ex. 4 and Pl. Ex. 5, A. 86 to A. 87, J.S. App., A-18, A-105). On the preceding day, counsel for GWU had been advised that there would be no room for negotiation with the Idaho officials and that GWU's only alternatives would be to comply fully with the Idaho letter or be subjected to a hearing in Idaho. (A. 289 to A. 292, Testimony of Steven C. Metzger, counsel for GWU; Pl. Ex. M-8, A. 76, Handwritten Notes of Steven C. Metzger).

This non-negotiable stance of the Idaho officials, confirmed in the final paragraph of the Idaho letter (A. 85), would have caused immediate, predictable and adverse consequences to GWU if it had continued to attempt to comply with the Idaho Act, including:

(a) The Idaho Director took the position that the registration statement filed March 21, 1977 was not complete, so that the 20-day time period for the calling of a hearing would not even begin to run until all of the additional information had been received and accepted as complete. (A. 85).

(b) The Idaho Director took the view that reimbursement of the $200,000 by GWU to Hecla and Silver Dollar for their

proxy fight expenses may have violated § 30-1505(2) of the Idaho Act, which forbids any offeror from engaging in any fraudulent, deceptive or manipulative acts or practices in connection with a takeover offer, including a sale by a controlling stockholder of a target company at a price higher than that paid other stockholders pursuant to a tender offer. (A. 84). In a telephone conversation with Mr. Baptie, GWU counsel was advised that the $200,000 arrangement "looked to be a pretty clear violation of that section of the statute which would have the effect of Great Western never really being able to get their registration statement effective."[3] (A. 290, Testimony of Steven Metzger).

(c) The Idaho letter further required a more definitive disclosure of any possible effect on Sunshine of GWU's preliminary proxy material which had been filed under confidential treatment with the SEC relating to a proposed plan of recapitalization. (A. 81). GWU recognized that disclosure in the tender offer of the effect on Sunshine of the plan of reorganization could be considered to be "gun-jumping" under the Securities Act of 1933 (the "1933 Act") and could in and of itself violate the Williams Act.[4] (A. 236, Testimony of G. Michael Boswell).

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[3] The United States District Judge for the District of Idaho found that the legality of the reimbursement of the proxy contest expenses up to $200,000 was not a matter which would lead to an injunction against a tender offer, and that Sunshine had a past practice of reimbursing participants in proxy contests for their expenses in similar situations. (Pl. Ex. M-3, A. 43 to A. 44).

[4] GWU's plan of reorganization involved, in fact, the elimination of preferred stock by the issuance of interest-bearing notes of equivalent value, as set forth in the litigation papers and the Vice-Chancellor's letter opinion dated September 19, 1977, in *Lewis and Betty Rubin v. Great Western United Corporation, et al*, C.A. 5397 (Ch. Del. August 29, 1977). The possible effect thereof on Sunshine would necessarily include the disclosure of a pro forma GWU balance sheet setting forth the estimated value of the notes to be issued in exchange for preferred stock.

(Footnote continued on following page)

(d) The Idaho letter also sought information on GWU's future plans for investigating and evaluating Sunshine's mining and other operations (A. 79) and on the impact a merger or disposition of some or all of Sunshine's subsidiaries and divisions would have on Sunshine and those stockholders who did not tender their shares. (A. 83). GWU's Schedule 13D had disclosed that, among other things, GWU intended to further investigate and evaluate Sunshine's mining and other operations upon consummation of the offer (A. 79), and that GWU would consider whether to seek to acquire all or a portion of the remaining Sunshine shares through various means, or whether to propose a merger or similar combination, depending upon a variety of factors, such as the number of shares purchased in the proposed tender offer, or otherwise, market conditions, asset values and earnings. No assurance was given that any such transaction would be consummated. (A. 45 to A. 46).

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[4] (Continued)

Section 5(c) of the 1933 Act, 15 U.S.C. § 77e(c), prohibits the making of offers of a security prior to the filing of a registration statement. The SEC and the courts have construed such prohibited offers very broadly to include any pre-filing publicity which arouses public interest or conditions the market to be more receptive to the issue, such as disclosure of the value of securities to be offered. *Chris-Craft Industries, Inc. v. Bangor Punta Corp.*, 426 F.2d 569 (2d Cir. 1970); *SEC v. Arvida Corp.*, 169 F.Supp. 211 (S.D.N.Y. 1958); SEC Release No. 33-3844 (October 8, 1957), 1 FED. SEC. L. REP. (CCH) ¶ 3250; Bloomenthal, 3A *Securities and Federal Corporate Law* § 6.09 (1978). GWU's plan of recapitalization was governed by SEC Rule 145, which applies to securities issued in certain types of corporate transactions. Rule 145(b) provides that certain specified limited information may be published prior to the filing of the registration statement, which information does not allow disclosure of the value of securities to be offered. This limited information is analogous to that permitted by a parallel rule, Rule 135, which applies to other types of public offerings. Rule 135 has been held to be exclusive and thereby to specify the only information which may be published prior to filing the registration statement. *Chris-Craft Industries, Inc. v. Bangor Punta Corp., supra*, at 573-76.

GWU was fearful that compliance with the Idaho letter, by premature disclosure of future plans and the effects of a preliminary merger plan, would itself violate the Williams Act. (A. 242, Testimony of G. Michael Boswell).[5]

(e) The Idaho letter further sought substantial additional information about GWU, including a description of each class of its capital stock and long-term debt,[6] a description of the location and character of the principal properties of GWU and its subsidiaries (A. 80), and disclosure of how GWU expected to repay the $35,000,000 commitment to finance the proposed tender offer. (A. 82). These financial

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[5] The United States District Judge for the District of Idaho determined that GWU's Schedule 13D accurately and completely set forth and described GWU's plans concerning a merger or other combination with Sunshine and all material information relating thereto, that no further disclosure concerning the effects of a merger need be made, and that a tender offeror is not required to make predictions of future behavior which may cause the offeree or the public investor to rely upon them unjustifiably. (A 48, A. 49 and A. 53).

Numerous other courts have recognized that in making disclosures in a tender offer, the offeror should not be called upon to predict the future with respect to its plans for the target. *Susquehanna Corp. v. Pan American Sulphur Co.*, 423 F.2d 1075 (5th Cir. 1970); *Copperweld Corp. v. Imetal*, 403 F.Supp. 579 (W.D.Pa. 1975); *Alaska Interstate Co. v. McMillian*, 402 F.Supp. 532 (D. Del. 1975).

It is also settled that it would be as serious a contravention of the federal securities laws to overstate the definiteness of future intentions with respect to merger as to understate them. *Susquehanna Corp. v. Pan American Sulphur Co., supra; Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937 (2d Cir. 1969); *Spielman v. General Host Corp.*, 402 F.Supp. 190 (S.D.N.Y. 1975), *aff'd.*, 538 F.2d 39 (2d Cir. 1976); *Nicholson File Co. v. H. K. Porter Co.*, 341 F.Supp. 508 (D. R.I. 1972), *aff'd*, 482 F.2d 421 (1st Cir. 1973).

[6] The United States District Court for the District of Idaho found that GWU's financial condition was fully described in its public filings (A. 48) and held that under the Williams Act public companies need not disclose financial information about themselves otherwise publicly available to the shareholders. (A. 53). Other courts have arrived at the same conclusion. *Alaska Interstate Co. v. McMillian*, 402 F. Supp. 532 (D. Del. 1975); *Interstate Brands Corp. v. DPF, Inc.*, 75 Civ. 417-W-4 (W.D. Mo. June 23, 1975).

inquiries as to capitalization, principal properties and projections were considered by GWU management to be irrelevant in the context of a cash tender offer, and included subjective materials and a request for items far more properly includable in a registration statement that would be utilized for the sale of a security (A. 235 to A. 236, Testimony of G. Michael Boswell), causing GWU to reach a determination that it might not ever be able to adequately respond to the Idaho letter. (May 23, 1977 Trial Tr., p. 156, Testimony of G. Michael Boswell).

(f) GWU was informed by the Idaho officials that they did not have the proper staff or the proper expertise to hold the hearing and would go outside the State of Idaho in order to find an expert who would act as the hearing officer. The Indiana Securities Commissioner was mentioned as a potential expert, but a definite date could not be given when a hearing would be called because the availability of any hearing officer was not known. Idaho officials also could not tell GWU how long the hearing might take, or how long it would take the hearing officer, once chosen, to render a decision. The resulting delay would materially decrease the likelihood of a successful tender offer because the management of the target company would have many tactical solutions available, including a friendly merger, the sale of attractive assets, the issuance of shares for the creation of antitrust implications and the opportunity to find a suitor who would raise the bid. (May 24, 1977 Trial Tr., p. 190, Testimony of G. Michael Boswell). During the period of delay, GWU would also be facing the expense of counsel fees and expenses for hearings during a lengthy and indeterminate period of time (May 24, 1977 Trial Tr., p. 192, Testimony of G. Michael Boswell), and GWU's funds for the tender offer would be frozen while the prevailing interest

rates continued to be charged on borrowed funds and the costs of capital incurred on internally available funds continued to increase. (A. 139 to A. 140, Testimony of John S. Guest, Managing Director and Treasurer of Kuhn, Loeb & Company).

(g) GWU recognized problems created by the advance disclosure and publication requirement of the Idaho Act, § 30-1503, in light of the fact that the New York Security Takeover Disclosure Act (N.Y. Bus. Corp. Law § 1600, *et seq.*) (the "New York Act") would apparently prohibit such advance disclosure and publication by requiring all proposed materials to be filed 20 days in advance with the Attorney General of New York. New York Act, §§ 1602 and 1603(a)(1). GWU had determined that the local papers in Boise, Idaho, which would carry the advance publication required under the Idaho Act had subscribers who were residents of New York, which could result in compliance with one statute leading to a violation of the other. (A. 235, Testimony of G. Michael Boswell).

(h) The Idaho position was reiterated that any tender made by GWU outside of Idaho without the offer being effective in Idaho would be unlawful under the Idaho Act. (A. 80).

Other Concurrent State Proceedings.

More than eight years after the adoption of the Williams Act, the State of New York enacted the New York Act, which became effective November 1, 1976, together with Codes, Rules and Regulations adopted thereunder, 2 Blue Sky L. Rep. (CCH) ¶ 35,663, and the State of Maryland adopted the Maryland Act, Md. Corp. & Ass'ns Code Ann. §§ 11-901 to 11-908 (Cum. Supp. 1976), which became effective July 1, 1976.

In similar fashion to the Idaho Act (§ 30-1506), the New York administrative rules require a takeover bid to be made by an offeror to all shareholders and on the same terms, § 12.4(f), and the Maryland Act forbids a takeover offer which is not made to all target company stockholders in Maryland and on substantially the same terms as the offer is made to stockholders outside Maryland. § 11-905(a)(1)-(2).

The New York Act applies to a takeover bid for the equity securities of a corporation organized in New York or having its principal place of business *and* substantial assets within New York, § 1601(a), whereas the Maryland Act applies to an offer for the securities of a corporation either organized in Maryland or having its principal place of business *or* a substantial portion of its assets in Maryland. § 11-901(i)(1)-(2).

Significantly, the presence or absence of Sunshine shareholders in New York or Maryland was irrelevant to the applicability of either statute.

Sunshine was not incorporated in New York or Maryland. Of Sunshine's 18,434 shareholders, 2,559 (approximately 13.9%) were brokers or individuals in New York. New York brokers held 1,839,531 (approximately 32%) of Sunshine's shares. New York individuals held 381,916 (approximately 6.6%) of Sunshine's shares. Of Sunshine's 18,434 shareholders, 370 (approximately 2%) were brokers or individuals in Maryland, holding a total of 84,663 (approximately 1.5%) of Sunshine's total outstanding shares. (A. 35 to A. 36).

GWU was confronted with the potential need to comply with the New York Act and the Maryland Act (as well as

the Idaho Act) because of Sunshine's business activities in New York and the assets of its subsidiary in Maryland.[7]

If applicable, the New York Act would have required GWU, among other things:

(a) To submit to the Attorney General of New York a pre-effective filing at least 20 days prior to making a takeover bid (§ 1602) containing the information prescribed in § 1603, which includes copies of all prospectuses, etc. by means of which GWU would have made the offer and the terms of that offer (§ 1603(a)1); a description of each class of GWU's capital stock and of its long-term debt, financial statements for the current period and for the three most recent annual accounting periods, a brief description of the business done and projected by GWU and its subsidiaries and the general development of such business over the past five years (§ 1603(a)7); and such other and further documents, exhibits, data and information as may be required by the Attorney General (§ 1603(a)8);

(b) To transmit, at the same time, a copy of that registration statement to Sunshine (§ 1602);

(c) To pay the New York registration fee (the fees range from $1,000 to $2,500) (§ 1608(b));

(d) To participate in a hearing which may be called by the Attorney General within 15 days and to commence within 40 days of the filing of the registration statement (§ 1604);

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[7] Wilful violation of the New York Act subjects the offeror to both civil and criminal penalties. §§ 1606(a) and 1607(a)-(b). Violation of the Maryland Act subjects the offeror to civil remedies, § 11-906, and a wilful violation subjects the offeror to criminal penalties consisting of a fine not exceeding $5,000 or imprisonment not exceeding three years, or both. Maryland Act, § 11-906, referencing § 11-705, 1A BLUE SKY L. REP. (CCH) ¶ 23,385.

(e) In the event the Attorney General shall schedule a hearing or conduct an investigation, to comply with the mandatory order prohibiting the making of the takeover bid (§ 1605(a)); and

(f) To delay the proposed tender offer until conclusion of the hearing or investigation and the issuance of a favorable order by the Attorney General (§ 1605(b)).

No time limitation is placed on when the Attorney General must rule on whether the requirements of the New York Act have been met, and, in fact, there is no statutory requirement that he rule at all.

Prior to the announcement of the proposed tender offer on March 21, 1977, special counsel in New York submitted a memorandum to the Attorney General in New York which argued that he had no jurisdiction under the New York Act. On March 24, 1977, the Office of the Attorney General stated that it had either concluded or believed that there was jurisdiction under the New York Act and recommended that GWU file a registration statement as soon as possible. (A. 116 to A. 119, Testimony of Milton Strom, New York counsel for GWU).

If applicable, the Maryland Act would have required GWU, among other things:

(a) To submit with the Maryland Commissioner a pre-effective filing at least 20 days prior to the dates on which the offer is made and copies are first published or sent or given to security holders, disclosing GWU's intention to make a tender offer and the terms of that offer (§ 11-902);

(b) To transmit, at the same time, a copy of that pre-effective filing to Sunshine (§ 11-902);

(c) To pay the Maryland registration fee of $100.00 (§ 11-902);

(d) To file with the Commissioner and send to Sunshine copies of all advertisements, circulars, letters or other material published by GWU soliciting or requesting the acceptance or rejection of the offer, not later than the time copies of such solicitation materials are first published, used or sent to security holders of Sunshine (§ 11-903); and

(e) As developed here, to participate in a hearing to determine whether the Maryland Commissioner had jurisdiction.

On March 21, 1977, counsel for GWU and counsel for Sunshine met with the Maryland Commissioner expressing their contrary views on the question of jurisdiction under the Maryland Act over GWU's proposed interstate cash tender offer. Both parties presented a written submission. The sole question in Maryland revolved around whether the assets of Sunshine's subsidiary, Anchor Post Products, Inc., constituted a substantial portion of Sunshine's assets. (March 30, 1977 Trial Tr., pp. 68-72, Statement by Dickee Howard Goodman, Assistant Attorney General of Maryland). Subsequently, the Maryland Commissioner advised counsel for GWU that it would be necessary to have a hearing to determine whether the Maryland Act was applicable to GWU's proposed tender offer. (J.S. App., A-89).

As was also the case in Idaho, GWU's offer would not have been subject to any requirements under either the New York Act or the Maryland Act if the terms had been accepted by Sunshine's Board of Directors and if Sunshine's shareholders had been informed as to any inducements to Sunshine's officers or directors (New York Act, § 1601(b)(5); Maryland Act, § 11-901(h)(2)(v)).

Sunshine's Board of Directors did not approve GWU's proposed tender offer terms,[8] and on March 20, 1977, authorized the retention of Wertheim & Co., Inc. ("WCI") to provide financial consulting and other services in connection with such proposed tender offer, including the responsibility to actively solicit competing tenders or other offers if considered by WCI to be warranted. On March 30, 1977, Sunshine and WCI entered into an agreement, whereunder WCI received a nonrefundable $200,000 retainer, plus additional fees if GWU's proposed offer failed and there was no other offer for Sunshine, or in the event of a third-party transaction or a merger between Sunshine and GWU, even if WCI provided no additional services. (Pl. Ex. M-5, A. 64 to A. 73).[9]

At this point, therefore, GWU was faced with the problem of meeting the requirements of three different state takeover statutes, each containing provisions differing from, if not conflicting with, each other as well as provisions in conflict with the administration of the federal program for the regulation of tender offers.

Compliance with the Idaho Act would have required GWU to attempt to add the additional information sought by the Idaho officials, to wait for the Idaho hearing (which the Director had to call at the request of Sunshine), to wait for

[8] GWU's initial offer was $16.75 per share if Sunshine's management would accept the offer. Sunshine's Board of Directors refused such acceptance, under the time constraints placed upon it. (J.S. App., A-87, n.3).

[9] GWU subsequently sued derivatively on behalf of Sunshine to declare, *inter alia*, any claims by WCI for such additional fees unenforceable on various grounds, including waste of corporate assets. There has been no complete resolution of this litigation. *Great Western United Corp. v. Sunshine Mining Co., et al*, 77 Civ. 4500 (S.D.N.Y. Sept. 12, 1977). The unusual provisions for additional fees in the Sunshine-WCI agreement are commented on in 1 M. Lipton and E. Steinberger, *Takeovers and Freezeouts*, 405 (1978).

and to comply with the orders to be issued thereafter and to await the conclusion of any judicial review procedures thereafter. Compliance with the Maryland Act would have required GWU to participate in a hearing on the applicability of the Maryland Act, to wait for a decision by the Maryland Commissioner and to comply with any orders which might be issued and to await the outcome of any judicial review procedures. Compliance with the New York Act would have required GWU to file the registration statement with the New York Attorney General and to await the outcome of any hearings and to comply with any orders issued as a result thereof, and to await the outcome of any judicial review procedures thereafter.

Litigation Instituted by GWU.

On March 28, 1977, GWU filed suit in the Northern District of Texas against the state officials responsible for enforcing the Idaho, New York and Maryland takeover laws.[10] The suit sought an order declaring that the Idaho, New York and Maryland Takeover Acts were invalid insofar as they purported to apply to an interstate cash tender offer for the purchase of securities traded on a national securities exchange. At the temporary restraining hearing on April 1, 1977, counsel for the Idaho and Maryland officials were in attendance and admitted that their respective state takeover statutes were applied extraterritorially. (A. 106 to A. 109 Statements by Peter R. Heiser, Jr. and Dickee Howard Goodman). Counsel for the Idaho defendants further recognized that the action taken by the issuance of the Idaho let-

[10] GWU sued both Wayne L. Kidwell, Attorney General of Idaho, and Tom D. McEldowney, Director of the Idaho Department of Finance, because they have concurrent jurisdiction under the Idaho Act to bring an enforcement action. (A. 104 to A. 105, Statement by Peter E. Heiser, Jr., Deputy Attorney General of Idaho.)

ter and Order under Idaho law affected GWU in Dallas, Texas.[11] (A. 107 Statement by Peter E. Heiser, Jr.).

Following a jurisdiction and venue hearing and a trial on the merits, only Appellant McEldowney filed an appeal of the District Court decision with the Fifth Circuit. The only party Appellant in this case before the United States Court of Appeals for the Fifth Circuit was Tom D. McEldowney. Since Wayne L. Kidwell was not a party to the proceeding in the Court from whose judgment this appeal is sought, he is not a proper party to any proceedings before this Court. U. S. Supreme Court Rule 10. GWU timely filed with this Court its Motion to Dismiss Wayne L. Kidwell (now David H. Leroy) as a party Appellant.

The Fifth Circuit decision unanimously affirmed the District Court on all issues other than jurisdiction; a majority of the Fifth Circuit affirmed the District Court on the issue of jurisdiction, over the dissent of Judge Godbold.

SUMMARY OF ARGUMENT

I.

THE IDAHO TAKEOVER STATUTE APPLIES EXTRATERRITORIALLY

Unlike any other state statutes, the Idaho Act *intentionally* affected and even prohibited interstate commerce among, and intrastate commerce within, other states. The officials of Idaho gave extraterritorial effect to the Idaho Act by forbidding GWU from making any offer to any resident of any state without first complying with its law, irrespective of the presence of any target company shareholders in Idaho. Idaho may not refuse to recognize the territorial limits of

[11] The effect of the action of the Idaho officials was characterized by the Fifth Circuit as stopping over 31 million dollars of interstate commerce. *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1284 (1978).

its legislative authority. The questions posed by the old English case of *Buchanan v. Rucker*, 130 Eng. Rep. 546, 547 (K.B. 1808) must be asked once again. "Can the Island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?"

It is no answer for Idaho to state that extraterritorial application of its laws was necessary to avoid discrimination against Idaho shareholders. That very statement proves the point — the Idaho Legislature has purposely sought to legislate for the entire nation by attempting to govern all of the extraterritorial aspects of a cash tender offer for securities traded in the national marketplace. It is also no answer for Appellants to rely upon the general proposition that the general corporate law of a state affects shareholders outside the state. The target company was not organized under the law of Idaho, but rather under the law of Washington, whose general corporate law would apply. It is further no answer for Appellants to rely upon state securities regulation under state Blue Sky laws because the constitutionality of such state regulation is expressly conditioned upon intrastate application.

II.

THIS SUIT IS NOT BARRED BY THE ELEVENTH AMENDENT

Under the landmark decision of *Ex Parte Young*, 209 U.S. 123 (1908), this suit to declare the Idaho Act unconstitutional and preempted under well-established constitutional principles is not a suit against the State of Idaho. It is an action against state officials in their individual capacities and, therefore, is not barred by the Eleventh Amendment. This Court has consistently upheld *Ex Parte Young*, and has recently applied the doctrine to support the imposition of attorney's fees against state officials where

such relief is necessary to enforce prospective injunctive relief. *Hutto v. Finney*, ... U.S. ....., 98 S.Ct. 2565 (1978). Once sovereign immunity is removed by application of the *Ex Parte Young* doctrine, the state official is subject to the jurisdiction of those courts which have personal jurisdiction over him by virtue of the application of specific federal jurisdictional statutes or state long-arm statutes. In this case, for jurisdiction purposes, the only question is whether a nonresident natural person who intentionally restricts or enjoins the consummation of a commercial transaction in the State of Texas is amenable to the jurisdiction of a federal court sitting in Texas in an action brought by the aggrieved party.

III.

THE DISTRICT COURT OBTAINED JURISDICTION OF THE APPELLANTS PURSUANT TO SECTION 27 OF THE SECURITIES EXCHANGE ACT OF 1934

Section 27 provides for personal jurisdiction as well as venue in civil suits brought under the 1934 Act. Section 28(a) of the 1934 Act places an affirmative responsibility on states not to enact legislation which conflicts with the provisions of the 1934 Act, including the Williams Act amendments regulating cash tender offers. Section 28(a) is an incorporation of the Supremacy Clause into the federal securities laws. The Idaho Act conflicts with the federal regulatory scheme for cash tender offers and the enforcement of the Idaho Act constitutes the violation or breach of duty in order to bring into play the jurisdictional mechanism of § 27. If § 28(a) is to have any meaning at all, the attempted enforcement of a state statute which conflicts with the 1934 Act breaches a duty. The absence of prohibitory language is not significant. For example, the Commerce Clause is

stated only as an affirmative grant of power to Congress, but this Court has had no difficulty in finding that the language itself imposes limitations on state regulation. If it were necessary to find a "violation" of the 1934 Act, as opposed to a breach of duty, in order to trigger the provisions of § 27, a "violation" has occurred by the attempted enforcement of a state statute which disregards the command of § 28(a). The fact that a violation has occurred does not necessarily lead to the conclusion that state officials would be subject to criminal penalties. The 1934 Act may be violated for purposes of § 27, even though that violation would not result in the imposition of criminal sanctions.

Once the applicability of § 27 is established, any "minimum contact" analysis becomes inapplicable, as only the territorial boundaries of the United States limit the validity of federal process where Congress has provided for nationwide service of process. Appellants at all material times have been resident citizens of the United States and are subject to the exercise of jurisdiction over them by a United States court. Accordingly, any act sufficient to constitute an offense within the Northern District of Texas was adequate to authorize extraterritorial service of process on Appellants.

Personal jurisdiction of Appellants was proper even if a "minimum contacts" analysis is applicable to suits involving a claim brought under § 27 of the 1934 Act. Appellants intentionally caused foreseeable consequences in the Northern District of Texas by ordering that GWU not proceed anywhere in the world with its proposed cash tender offer until the requirements of the Idaho Act were met to the satisfaction of the Idaho officials. Because the consequences of Appellants' activities had a substantial impact on the activities and plans of GWU in the Northern District of Texas, venue under § 27 was established, and service of

process properly made was sufficient to establish personal jurisdiction over Appellants even though they were not physically present in the forum and had not personally engaged in acts or transactions within the forum. As more fully discussed in the argument on the applicability of the Texas Long-Arm Statute, the consequences of the attempted enforcement of the Idaho Act by Appellants having extra-territorial impact were sufficient to support personal jurisdiction over them by the District Court.

IV.

THE TEXAS LONG-ARM STATUTE SUBJECTED APPELLANTS TO PERSONAL JURISDICTION IN THE NORTHERN DISTRICT OF TEXAS

Jurisdictional determinations under the Texas Long-Arm Statute, TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964), depend solely upon the scope of the United States Constitution. The applicability of the Texas Long-Arm Statute is not limited only to proprietary or commercial activities. The statute was designed to provide a forum for Texas residents to redress injuries suffered by the conduct of nonresidents, not merely to regulate proprietary or commercial conduct. Appellants had sufficient minimum contacts with the Northern District of Texas so that the imposition of jurisdiction over them did not offend traditional notions of fair play and substantial justice. Appellants' contacts with the forum were deliberate and not fortuitous. They affirmatively sought to regulate the commercial activity of GWU in Texas and elsewhere by the attempted enforcement of the Idaho Act, causing predictable and adverse consequences in Texas. GWU's suit to declare the Idaho Act unenforceable and to restrain its enforcement arose directly out of Appellants' activities.

V.

VENUE WAS PROPER IN THE NORTHERN DISTRICT OF TEXAS PURSUANT TO SECTION 27 OF THE 1934 ACT

Venue was proper in the Northern District of Texas pursuant to § 27 of the 1934 Act, which provides that venue lies, among other places, in the district in which any act or transaction constituting the breach of duty or violation occurred. The fact that the consequences of Appellants' activities had substantial impact on the operations, intrastate as well as interstate, of GWU at its Dallas, Texas corporate headquarters was sufficient to confer venue there. The crucial element of the attempted enforcement of the Idaho Act was the restraint and resulting harm to GWU. The effects of Appellants' activities in the forum were sufficient to support personal jurisdiction and, therefore, venue there, irrespective of the fact that Appellants were not physically present in that district or engaged in acts or transactions there.

VI.

VENUE IN THE NORTHERN DISTRICT OF TEXAS WAS PROPER UNDER 28 U.S.C. § 1391(b)

Venue in this case was also proper under 28 U.S.C. § 1391(b), the general venue statute applicable to suits which are not based solely on diversity of citizenship. That section provides that such a suit may be brought, among other places, in the federal district "in which the claim arose." Under § 1391(b) venue should be proper in any federal district from which compulsory process can validly issue. In this case the injury to GWU and the restraint of its commercial activities resulting from the impositon of the Idaho Act occurred in the Northern District of Texas. For purposes of

§ 1391(b) the claim thus arose in the Northern District of Texas.

Venue in this suit against Idaho officials should be held proper in the district where their actions and decisions had their effect, not where they were initiated. The present cause of action is based on the effects of the enforcement of the Idaho Act, not the determination by the Idaho officials to apply that Act.

The purpose of providing venue in the district where the claim arose was to assure that venue would be proper in at least one federal district as to all defendants in multi-party litigation. At one point in this litigation, it appeared that three states, New York and Maryland as well as Idaho, would attempt to assert jurisdiction over GWU's offer. Thus, there would have been no district in which all defendants resided and only in the Northern District of Texas, the focal point of Appellants' regulatory activity, could the entire controversy have been tried in a single suit.

VII.

FEDERAL SECURITIES REGULATION PREEMPTS THE IDAHO ACT

The Idaho Act is invalid under the Supremacy Clause of the Constitution of the United States. The constitutional mandate that federal law is the supreme law of the land was restated in the 1934 Act by § 28(a), which forbids state legislation inconsistent with the federal regulatory scheme. The federal regulatory scheme adopted by Congress reflects a policy of neutrality for the purpose of shareholder protection, whereby evenhanded treatment is given the tender offeror and target management in the context of an interstate cash tender offer. Specifically, the legislative history of the Williams Act reveals a studied determination not to require pre-effective filings, agency approvals, or massive disclosure documents, and to regulate the conduct of the tender offeror and target management in an effort to avoid tipping the scales in favor of either. The Idaho Act destroys that congressional policy in the very ways which Congress rejected through the imposition of pre-effective filings, waiting periods, hearing procedures, burdensome disclosure requirements and purported extraterritorial reach, and is so pro-management (and not pro-shareholder) as to apply irrespective of the presence of target company shareholders in Idaho and to give target management *carte blanche* authority to remove from shareholders the very protections the statute was allegedly designed to provide. One immediate result is the imposition of delay to discourage or deter the making of cash tender offers in the first instance, and to give incumbent management the opportunity to further their own self-interest or to defeat the tender offer by bringing into play a variety of defensive tactics. In fact, delay does not necessarily guarantee to target shareholders any benefits at all. The Idaho "fiduciary" approach to shareholder protection conflicts with the "market" approach chosen by Congress by abrogating the policy of neutrality established by Congress.

The federal securities laws, the rules and regulations promulgated by the SEC thereunder, and the myriad of federal cases dealing with tender offers establish a pervasive and complete federal regulatory scheme so as to compel the conclusion that Congress has left no room for supplemental or additional state legislation on access to the national securities marketplace, including access by means of the cash tender offer.

Control of interstate tender offers requires a uniform system of national regulation because non-uniform and conflicting regulation precludes the effective functioning of the national securities marketplace. The need for a uniform system of regulation is exemplified by the situation which actually occurred here, where the States of Idaho, Maryland and New York were asserting, threatening or considering jurisdiction over a tender offeror who had fully complied with all aspects of the disclosure and substantive provisions of the Williams Act.

VIII.

THE IDAHO ACT IMPERMISSIBLY BURDENS INTERSTATE COMMERCE

The Idaho Act is unconstitutional under well-established principles based upon the Commerce Clause of the United States Constitution. The Idaho Act does not effectuate a legitimate local public interest, despite the lip-service it would give to shareholder protection. The true purpose of the Idaho Act is to protect local industry by deterring tender offers in order to maintain and foster local interests and keep incumbent management entrenched. In this very case, the target shareholders suffered economic injury because of the delays caused by target management through operation of the Idaho Act and GWU's reduction of the offering price in response. The direct effect of the operation of the Idaho Act was to impermissibly burden interstate commerce by stopping over 31 million dollars of interstate commerce.

The extraterritorial application of the Idaho Act runs afoul of the policy of free trade reflected in the Commerce Clause. Even if the Idaho Act serves any legitimate local interest, the burden on interstate commerce is excessive in relation thereto. The Idaho Act would purport to apply everywhere in

the world, irrespective of any benefit to any Idaho resident. Idaho can encourage good corporate citizenship in ways which have a far less substantial impact on interstate commerce than by discouraging interstate cash tender offers.

IX.

GWU HAS STANDING TO CHALLENGE THE ENFORCEABILITY AND CONSTITUTIONALITY OF THE IDAHO ACT

The actions of the Appellants effectively enjoined GWU's proposed cash tender offer and tied up GWU's funds. GWU clearly suffered a threatened or actual injury resulting from putatively illegal action and met the "injury in fact" test for standing. Having complied with all requirements of federal law, GWU was uniquely within "the zone of interests" intended to be protected should the Idaho Act prove to be preempted or unconstitutional.

GWU did not seek to base its suit upon any implied cause of action under the Williams Act, and did not seek damages against the target company or anyone else. This Court's opinion in *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), holding that a defeated tender offeror had no standing to seek damages from the target company and the successful tender offeror, is not relevant to the issue of standing to assert the unconstitutionality and unenforceability of the Idaho Act. To the extent that decision could have any relevance, this Court specifically left open the question of standing of a tender offeror to sue for relief other than damages, and the congressional policy of evenhandedness in the regulation of tender offeror and target management under the Williams Act supports standing for declaratory and injunctive relief under the 1934 Act. Likewise, GWU did not assert standing on the basis of any violation

of § 10(b) of the 1934 Act or Rule 10b-5 promulgated thereunder, so that *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), is inapplicable.

X.

WAYNE L. KIDWELL (NOW DAVID H. LEROY) SHOULD BE DISMISSED AS A PARTY APPELLANT

Wayne L. Kidwell (now David H. Leroy) should be dismissed as a party Appellant because he did not appeal from the judgment of the District Court and was not a party in the Fifth Circuit from which this appeal has been taken. U. S. Supreme Court Rule 10.

ARGUMENT

I.

THE IDAHO TAKEOVER STATUTE APPLIES EXTRATERRITORIALLY

The question in this case is whether a state may legislate extraterritorially to restrain the internal commerce of a sister state, then claim that courts sitting in that sister state are powerless to rule on the validity of the enactment under the Federal Constitution.

The court below fashioned no new principles of federalism. It took no action to disturb the harmony between sovereigns exercising concurrent jurisdiction. Rather, it applied traditional principles within the proscenium of a state takeover act which intentionally affected and prohibited commerce among the several states and within other states. The Idaho Act thus applied extraterritorially to such an extent that it is repugnant to the Federal Constitution, *see, 70 et seq., infra.*

An interstate cash tender offer is a nationwide public solicitation for shares of a target company. The Sunshine stock

which GWU was attempting to acquire in the course of its tender offer was held by shareholders in virtually every state and was regularly traded on national securities markets. Despite the nationwide character of GWU's tender offer, it was delayed for five months by the Idaho Department of Finance determining to take jurisdiction of the subject matter. The offer was finally made to Sunshine shareholders only after entry of the district court's judgment in the case at bar that the Idaho Act is unconstitutional and unenforceable and subsequent to the circuit court's order of September 16, 1977, refusing to stay that judgment pending appeal. Thus, by application of the Idaho Act, Appellants, for a substantial period of time, denied to residents of all states, including Texas, their rights to determine whether they wished to accept GWU's offer. As Judge Wisdom forcefully observed in his opinion for the Fifth Circuit in this case:

> Idaho Code § 30-1530(1) states, in part, that "It is unlawful for any person to make a takeover offer involving a target company in this state, or to acquire any equity securities of a target company pursuant to the offer, unless the offer is effective under this chapter or is exempted by rule or order of the director." As interpreted by the Idaho Department of Finance, this provision would prevent Great Western from making a tender offer to anyone in the world if it did not comply with the Idaho statute.[12]

The teachings of this Court prohibit Appellants from asserting this extraordinary power over the commerce of other states and support the jurisdiction of courts sitting in those

[12] 577 F.2d at 1263. Similarly, the district judge concluded that:

> Officials of Idaho . . . give extraterritorial effect to their takeover statute[ ] by forbidding tender offerors under their jurisdiction from making any offer to residents of another state which is not made to residents of Idaho.

District Court's Findings of Facts and Conclusions of Law filed April 21, 1977 at 6.

other states to pass on the legality of the exercise of such extraterritoial regulations. A state may not refuse to recognize the territorial limits of its legislative authority. Legislative enactments can have binding effect only within the territorial confines of the jurisdiction passing the law. *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934); *Hilton v. Guyot*, 159 U.S. 113 (1895). By virtue of an Idaho statute a corporation with its principal place of business in Dallas, Texas was forbidden from making an offer to the 439 individual shareholders of Sunshine who resided in Texas as well as those Sunshine shareholders who resided throughout the nation. This Court has never tolerated such an abuse of sovereign powers. In *Alaska Packers Association v. Industrial Accident Commission*, 294 U.S. 532, 540 (1935), Justice Stone stated:

> The due process clause denies to a state any power to restrict or control the obligation of contracts executed and to be performed without the state, as an attempt to exercise power over a subject matter not within its constitutional jurisdiction. . . . Similarly, a state may not penalize or tax a contract entered into and to be performed outside the state, although one of the contracting parties is within the state.

In that case this Court upheld the California workmen's compensation statute as applied to an injury sustained by an employee injured in Alaska because:

> The California statute does not purport to have any extraterritorial effect, in the sense that it undertakes to impose a rule for foreign tribunals nor did the judgment of the state supreme court give it any. The statute assumes only to provide the remedy to be granted by the California Commission for injuries, received in the course of employment entered into within the state, wherever they may occur.

Id. The Idaho statute here at issue does far more. It prohibited the formation of contracts for the purchase and sale

of securities where no Idaho residents were involved. Indeed, the Idaho statute by its terms, purports to apply to tender offers even if the target company has no shareholders who reside in Idaho. Application of the statute is wholly unrelated even to the existence of that class of persons whom it allegedly protects.

> None of the state [takeover] statutes base their [sic] jurisdiction over tender offers on the residency of the offeree-shareholders. Instead, they purport to protect all shareholders, regardless of their place of residence. Most states even go so far as to prohibit tender offers that exclude the residents of that state. It thus appears that the protection of state shareholders is neither the primary purpose or the resultant effect of state tender offer statutes.

E. ARANOW, H. EINHORN AND G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL at 230 (1977); Idaho Act § 30-1506(1). Thus, it is inconceivable that the Idaho statute was intended to apply only within the confines of the State of Idaho and the legal presumption that a legislative enactment is not intended to apply outside the territorial jurisdiction of the state in which it is enacted is completely dispelled.

The Supreme Court of Minnesota has recently ruled on the constitutionality of a statute of that state which declared it a felony to detain one's own child outside the state with the intent to deny another's rights under an existing court order. *State v. McCormick*, 273 N.W.2d 624 (Minn. 1978). The statute, the court held, violated the Sixth Amendment of the U. S. Constitution in that it purported to apply Minnesota criminal law extraterritorially. The court could find no ". . . adequate grounds for disregarding limitations on extraterritorial jurisdiction which have long been recognized as the law of the land." *Id.* at 625. The Minnesota court spoke to another flaw in the Minnesota statute which is shared by the Idaho Act.

> One further serious infirmity in the statute is its potential application where no contact between the parents, the child and the state of Minnesota exists. The state's argument assumes that the statute is intended to protect only the welfare of children residing with a parent in Minnesota pursuant to rights conferred by a Minnesota court. The statute is not so limited. For example, by its plain language, it would also make it a felony in Minnesota for a California parent to wrongfully detain a child from a parent living in Colorado in violation of rights conferred by a Nebraska court order. Granted Minnesota is not likely to assume jurisdiction under such circumstances, this hypothetical simply illustrates the scope of the prohibition included in [the statute] and points up the difficulty of determining with certainty what interests the statute is designed to protect.

Id. at 627-8.

Similarly, the Idaho Act was applied here to a tender offer involving a target company incorporated in Washington and an offeror which is incorporated in Delaware with its principal place of business in Texas. This application precluded the Texas-based corporation from purchasing stock held by residents of Texas and every other state whether or not any target company shareholders, for whose benefit the Idaho Act purports to exist, reside in Idaho. This gives one pause to wonder "what interests the statute is designed to protect." Like the Minnesota Legislature, the Idaho Legislature may have acted with a salutary intent, but in passing the Idaho Act "it has reached too far." *Id.* at 628.[13] As Judge Wisdom concluded for the Fifth Circuit:

> The Idaho legislature, through its extraterritorial law, made the entire country its laboratory. The takeover

[13] The Minnesota Supreme Court also accurately explained the paucity of cases involving the extraterritorial application of state statutes: "The fact that so few courts have addressed the question suggests traditional restraint in prosecuting offenses committed outside the borders of a state is broadly accepted." 273 N.W.2d at 628.

> statute had extensive, deliberate, and foreseeable effects on transactions having only a minimal connection with Idaho.

577 F.2d at 1287.

In deciding the extent to which the Full Faith and Credit Clause requires the courts of one state to apply and enforce the statutes of sister states this Court declared:

> [I]n the case of statutes, the extrastate effect of which Congress has not prescribed, as it may under the constitutional provision, we think the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events.

Pacific Employers Insurance Co. v. Industrial Accident Commission, 306 U.S. 493, 502 (1939). This Court's conclusion that the Full Faith and Credit Clause "does not here enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it" (*Id.* at 504-5) has recently been reaffirmed. *Nevada v. Hall*, 47 U.S.L.W. 4261, 4265 (March 5, 1979). Thus, a State is not required by the Full Faith and Credit Clause to apply the statute of a sister state which conflicts with its own valid domestic policy. However, if the courts sitting within a state choose to apply the statute of another state which by its terms purports to apply to the case at hand, surely that court, which could have rejected application of the statute altogether, must be free to determine the validity of the statute.

Appellants, as they must, concede that the Idaho statute applies extraterritorially. However, they take the position that ". . . states are entitled to have laws with an extra-

territorial effect. . . ." Appellants' Brief at 46. To support this notion they say it is established domestic relations law that actions are permissible which involve the status of marriage in situations where personal jurisdiction over one of the spouses is lacking. First, there is a difference between a statute which has a residual extraterritorial effect and one which intentionally applies to circumscribe behavior by parties who are not residents of the state. "Obviously the power of a state to effect legal consequences is not limited to occurrences within the state if it has control over the status which gives rise to those consequences." *Alaska Packers Association v. Industrial Accident Commission, supra,* at 541. Clearly, in a domestic relations situation, if the court has subject matter jurisdiction and personal jurisdiction over *one* of the parties it has sufficient "control over the status" of the marriage to permit a state to prescribe "legal consequences" which would not be "limited to occurrences within the state." Appellants' analogy is unsound. It is one thing for a state to assert jurisdiction over a marital relationship where one of the parties is subject to its jurisdiction. But the Idaho statute here under consideration is more analogous to a domestic relations law passed by the State of Idaho which purports to determine whether two Texas residents can enter into a binding marriage if one of them happens to own some property in the State of Idaho.

Appellants next argue that the general corporation law of a state has effects on shareholders outside the state. Once again, to say that a corporation in its internal affairs is subject to the jurisdiction of a state's corporation law which thereby determines various rights of shareholders wherever they may reside is something quite different from saying that Idaho could apply its corporation law to regulate directly the internal affairs of Texas-based corporations. Indeed, the con-

stitutionality of state Blue Sky laws which provide intrastate regulation of the issuance of securities was upheld prior to the passage of any federal securities laws of general applicability on the express ground that they applied only "within the state." *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917); *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917); *Merrick v. Halsey & Co.*, 242 U.S. 568 (1917).

In *Hall v. Geiger-Jones Co., supra,* dealers in corporate securities argued against the validity of the provisions of the Ohio Blue Sky law, claiming such provisions constituted an undue burden on interstate commerce in contravention of the Commerce Clause of the Constitution of the United States. This Court looked first to the language of the statute which prohibited any dealer *within this state* from disposing of certain securities without first being licensed to do so by Ohio. Emphasizing the intrastate nature of the statute, this Court stated:

> The provisions of the law, it will be observed, apply to dispositions of securities *within* the state, and while information of those issued in other states and foreign countries is required to be filed (§ 6373-9), they are only affected by the requirement of a license of one who deals with them *within* the state. Upon their transportation into the state, there is no impediment, — no regulation of them or interference with them after they get there. There is the exaction only that he who disposes of them there shall be licensed to do so, and this only that they may not appear in false character and impose an appearance of a value which they may not possess, — and this certainly is only an indirect burden upon them as objects of interstate commerce, if they may be regarded as such. It is a police regulation strictly, not affecting them until there is an attempt to make disposition of them within the state. To give them more immunity than this is to give them more immunity than more tangible articles are given, they

> having no exemption from regulations the purpose of which is to prevent fraud or deception. Such regulations affect interstate commerce in them only incidentally.

Id. at 557-8 (citations omitted).

When the Securities Act of 1933 and the 1934 Act were passed each contained a provision which preserved this intrastate regulation. The House Committee Report on the 1933 Act stated: "The bill carefully preserves the jurisdiction of state security commissions to regulate transactions *within their own borders.* [H. Rep. No. 85, 73d Cong., 1st Sess., P. 10 (1933) (Emphasis supplied)]."[14]

The present controvery involves the assertion of jurisdiction by the State of Idaho over an interstate tender offer which involved an offeror which is neither incorporated nor licensed to do business in Idaho and a target company which is not incorporated in the State of Idaho, all with utter disregard for the residence of target company shareholders who are allegedly the persons for whose protection the Idaho

[14] Subsequent decisions have repeated that a state securities law can have no extraterritorial effect. Thus, California may not regulate the issuance and sale of securities outside its borders, *Jones v. R-Mine Oil Co.*, 119 P.2d 219 (1941); *Los Angeles Fisheries v. Crook*, 47 F.2d 1031 (5th Cir. 1931). California may, however, regulate for the protection of its residents and citizens the issuance and sale within its borders of stock of a corporation organized elsewhere. *Gillis v. Pan American Western Petroleum Co.*, 3 Cal.2d 249, 44 P.2d 311 (1935). There is no right of action under the Illinois Securities Law of 1919 unless the sale complained of takes place in Illinois. *McBreen v. Iceco, Inc.*, 12 Ill.App.2d 372, 139 N.E.2d 845 (1956), citing Fletcher, *Cyclopedia of Corporations* (1945 Rev. Vol. [now 1975 Rev. Vol.]) Sec. 6742, for the proposition that the Blue Sky laws have no extraterritorial effect. It was held fundamental that the Indiana Blue Sky Law can have no extraterritorial effect in *Brocalsa Chemical Co. v. Langsenkamp*, 32 F.2d 725 (6th Cir. 1929). The securities laws of Utah are not applicable to contracts for the sale of securities in Nevada. *United States Bond & Finance Corp. v. National Bldg. & Loan Assn. of America*, 80 Utah 62, 12 P.2d 758 (1932). The Blue Sky requirements of Alabama are inapplicable to sales of stock in Mississippi, notwithstanding the fact that the corporation was organized under Alabama law. *Guinn v. Shulters*, 78 S.2d 114 (1955).

statute exists. Therefore, the courts below were not asked to determine the manner in which the State of Idaho may permissibly govern its internal affairs or the way in which it may regulate the status of relationships which have a sufficient nexus with the state. Those courts were required only to determine whether the Idaho Act could be applied to regulate and halt commerce within the State of Texas and throughout the nation.

By its extraterritorial reach the Idaho Act violated the most basic principle of federalism — that each state is sovereign except as otherwise provided in the U.S. Constitution. Sovereignty exercised by a state beyond its borders is usurpation — a usurpation which a state should be called upon to justify in courts sitting in the state whose sovereignty was impugned by the extraterritorial regulation. "Can the Island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?" *Buchanan v. Rucker*, 103 Eng. Rep. 546, 547 (K.B. 1808).

II.

THIS SUIT IS NOT BARRED BY THE ELEVENTH AMENDMENT

The teaching of *Ex parte Young*, 209 U.S. 123 (1908) has remained unlimited by this Court's holdings and stands unchallenged by the Appellants. A suit by an aggrieved person to restrain a state official from enforcing an allegedly unconstitutional state statute is a suit against the state official in his individual capacity and therefore is not barred by the Eleventh Amendment. "This Court has long held that a suit to restrain an unconstitutional action threatened by an individual who is a state officer is not a suit against the State." *Georgia Railroad & Bank Co. v. Redwine*, 342 U.S. 299, 304

(1952). And in *Edelman v. Jordan*, 415 U.S. 651 (1974), this Court once again decreed that the granting of prospective injunctive relief against state officials acting unconstitutionally is sanctioned by *Ex parte Young*. The doctrine of *Ex parte Young* is such a cornerstone of federal jurisdiction that the Fifth Circuit was prompted to write:

> So far as concerns "sovereign immunity" as a defense to a suit to enjoin state or federal officials from failing to comply with the laws spelling out their legal authority, the raising of such a defense in this action borders on the frivolous.

Ragland v. Mueller, 460 F.2d 1196, 1197 (5th Cir. 1972).

This Court has consistently declined invitations to overrule or limit the scope of *Ex parte Young*. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 156-157 n. 6 (1978). And despite the limitation of *Ex parte Young* to suits for prospective injunctive relief, this Court has held that costs of compliance with prospective orders issued by federal courts are "ancillary" to the order enforcing federal law. Therefore, the Eleventh Amendment does not prevent an award of attorney's fees against state officers in their official capacities, for such an award is indistinguishable from other penalties imposed to enforce prospectve injunctions issued by federal courts. *Hutto v. Finney*, ... U.S. ....., 98 S.Ct. 2565 (1978).

Appellants take the position that the *Young* doctrine permits a state official to be sued only in his home state. There is no justification for engrafting such a limitation onto the doctrine. Where the doctrine applies a state official is "stripped of his official or representative character and is subject in his person to the consequences of his individual conduct." *Ex parte Young*, 209 U.S. at 160. Once the barrier of the

Eleventh Amendment is lowered there is no justification for distinguishing between a state official and a private litigant. He, like any other litigant in the federal courts, would be subject only to the jurisdiction of those courts which can exert personal jurisdiction over him in consonance with due process guarantees. The Fifth Circuit correctly and logically applied the doctrine of *Ex parte Young* as its progeny dictates, concluding:

> We read *Young* to say a state official enforcing an unconstitutional statute is an individual defendant and nothing more. Under the reasoning of *Ex Parte Young*, the state has no interest in the lawsuit, for it is incapable of authorizing an unconstitutional act.

577 F.2d at 1265. Thus, if a federal statute or a state long-arm statute provides a federal court with jurisdiction over the person of a private litigant in a given situation, personal jurisdiction should also be proper over a nonresident state official who has been stripped of his sovereign character.

The instant case bears a striking resemblance to *Maney v. Ratcliff*, 399 F.Supp. 760 (E.D. Wis. 1975) in which government officials in Louisiana were subjected to the jurisdiction of a federal court sitting in Wisconsin by virtue of the application of that state's long-arm statute. The plaintiff in that case had been arrested on a minor traffic violation in Milwaukee, Wisconsin. Following standard procedure, the police checked the Federal Bureau of Investigation's National Crime Information Center ("NCIC") to determine whether he was wanted in any other jurisdiction. He was, in fact, wanted on felony charges in Baton Rouge, Louisiana. However, extradition was not effected and he was released although he was subsequently arrested on the basis of the NCIC information. The plaintiff filed an action challenging

the use of the NCIC to locate and detain him so that he could be extradited to Louisiana. The suit, filed in the Eastern District of Wisconsin, was brought against the Chief of Police of Baton Rouge, Louisiana and a police officer of that force. The defendants also included the District Attorney for the East Baton Parish and an Assistant District Attorney. The plaintiff specifically alleged that each of the defendant officials resided in Baton Rouge, Louisiana. The court determined that the use of the NCIC system by the police and prosecutors from Louisiana to detain the plaintiff in Wisconsin constituted sufficient "contacts" with the forum to support jurisdiction in the case based on 42 U.S.C. § 1983. Just as § 1983 permits suits against state officials, so the doctrine of *Ex parte Young* permits such suits in those cases to which it applies. Once it is established that the suit may be brought, whether by virtue of § 1983 or the *Young* doctrine, the question of where that suit may be brought should be resolved by focusing on specific statutes of Congress which dictate where the suit may be brought or upon the "contacts" of the defendant officials with the forum district.

This Court recently held in *Nevada v. Hall*, 47 U.S.L.W. 4261 (March 5, 1979) that there is no constitutional impediment to preclude a state from empowering its courts to entertain suits brought by its citizens against other states. A state's immunity from suit in the courts of another state is a matter of comity alone. *Id.* at 4265. In his opinion for this Court Justice Stevens noted that the Eleventh Amendment does place explicit limits on the powers of federal courts to entertain suits against a state. Referring to those limitations this Court stated:

> Even as so limited, however, the Eleventh Amendment has not accorded the States absolute sovereign immunity in federal court actions. The States are subject to suit by both their sister States and the United States. . . . Further, prospective injunction and declaratory relief is available against States in suits in federal court in which state officials are the nominal defendants.

Id. at 4246, n.19. Where the doctrine of *Ex parte Young* is applicable the reasoning of *Nevada v. Hall* should control a court's analysis in determining the amenability of a state official to the personal jurisdiction of a federal court sitting in a state other than that in which the state official resides. Where no specific constitutional restraints prevent the exercise of such jurisdiction, the threat that such suits will cause attorneys general of the states to be constantly traveling about the country defending lawsuits is insufficient to deny the jurisdiction. Such a fear, however, is unfounded. Only when a state official attempts to exercise his authority beyond his jurisdictional limits or otherwise has sufficient contacts with another state may he be subjected to the jurisdiction of a court sitting in that state. Interestingly, this Court's decision in *Nevada v. Hall* would squarely support jurisdiction in the instant case if GWU had brought its suit in a Texas state court and Texas had chosen not to recognize a defense of sovereignty.

The argument that *Ex parte Young* permits a state official to be sued only in federal courts located in the state where he holds office is further undercut by the concurring opinions of four members of this Court in *California v. Texas*, ... U.S. ....., 98 S.Ct. 3107 (1978). Those opinions suggest the availability of a federal interpleader action where an estate is potentially subject to the conflicting tax claims of two or more states. The ratio decidendi of those opinions is that a federal forum exists wherein personal jurisdiction over the taxing officials of both Texas and California is proper. The officials of at least one state must defend the ac-

tion in a federal district court outside the state in which they hold office. The *power* to compel a state official to defend a suit against him outside his home state exists. Therefore, the remaining, and conventional, inquiry is whether the nonresident official is subject to personal jurisdiction of the court by virtue of the provisions of a federal statute or otherwise has sufficient contacts with the forum to support its assertion of personal jurisdiction.

As the Fifth Circuit noted, the propriety of personal jurisdiction in Texas in this suit was a function of Idaho's regulatory activities, not the trial court's failure to properly understand and apply the *Young* doctrine.

> The dearth of previous cases where a state official has been sued outside his home state is probably attributable to the states having rarely, if ever, enacted statutes similar to the Idaho Take-over law (and most other state take-over laws) that purport to extend a local official's regulatory jurisdiction to other states.

577 F.2d at 1266. For jurisdiction purposes, the question posed to the courts below was simply whether a nonresident natural person who performs acts which intentionally restrict or prevent the consummation of business transactions in the State of Texas is amenable to the jurisdiction of a federal court sitting in Texas in a suit brought by an aggrieved party.

Appellants cite *Turner v. Baxley*, 354 F. Supp. 963 (D. Vt. 1972) and *Idaho Potato Commission v. Washington Potato Commission*, 410 F. Supp. 171 (D. Idaho 1976) to support their contention that federal cases have shown a "consistent pattern" to permit suits against state officials only in federal courts within their home states. Neither of these cases demonstrates an application of that proposition. In *Turner* the

court never intimated that it was impossible for a federal court to exercise personal jurisdiction over a nonresident state official. Instead, the court merely determined that the nonresident state officials lacked sufficient minimum contacts with the forum to support personal jurisdiction under the facts of the case as presented. In fact, the *Turner* decision would support the propriety of exerting personal jurisdiction over Appellants in Texas in that it (1) recognizes the vitality of *Ex parte Young*, (2) treats state officials who are stripped of their Eleventh Amendment immunity the same as any nonresident defendant and applies conventional due process standards to determine whether personal jurisdiction of them is proper and (3) acknowledges that the commission of an act calculated to have an effect in a state can constitute a sufficient contact with that state for purposes of personal jurisdiction. The *Idaho Potato Commission* case affords Appellants no support for that case did not involve a state official. The court, in effect, determined that the Washington Potato Commission was not a state agency. 410 F. Supp. at 176-7. Therefore, the individual commissioners could not be considered state officers.

III.

THE DISTRICT COURT OBTAINED JURISDICTION OVER THE APPELLANTS PURSUANT TO SECTION 27 OF THE SECURITIES EXCHANGE ACT OF 1934

Personal jurisdiction over Appellants was proper under § 27 of the 1934 Act which provides that a suit or action to enforce any liability or duty created by the Act, or the rules and regulations promulgated thereunder, may be brought in the district wherein any act or transaction constituting the violation occurred and process may be served in any other district of which the defendant is an inhabitant or

wherever the defendant may be found.[15] "Without question the intent of the venue and jurisdiction provisions of the securities laws is to grant potential plaintiffs liberal choice in their selection of a forum." *Ritter v. Zuspan*, 451 F. Supp. 926, 928 (E.D. Mich. 1978).

Section 27 provides for personal jurisdiction as well as venue in civil suits brought under the 1934 Act. *See, e.g., S-G Securities, Inc. v. Fuqua Investment Co.* [CURRENT] FED. SEC. L. REP. (CCH) ¶ 96,750 (D. Mass. Dec. 19, 1978). Appellants argue that the provisions of § 27 are inapplicable because they committed no "violation" of the Act to trigger the jurisdictional provisions. However, § 27 is applicable to enforce "any . . . duty . . . *or* to enjoin any violation. . . ." (Emphasis supplied.) Section 28(a) of the 1934 Act places an affirmative obligation on states not to enact legislation which conflicts with the provisions of the 1934 Act of which the Williams Act is a part. The specific conflicts between the Williams Act and the Idaho statute are addressed in detail, *infra*, in the discussion relating to the preemption of the Idaho Act. Appellants argue that § 28(a) imposes upon them no affirmative duty which can be violated for purposes of § 27. But the clear implication of the language of § 28(a) is that it prohibits state officials from enforcing state statutes in

[15] 15 U.S.C. § 78aa (1970). That section provides in pertinent part:

> Any criminal proceeding [under the Act] may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

conflict with the 1934 Act,[16] and § 27 is the jurisdictional mechanism provided by Congress to enforce the policy of § 28(a). For § 28(a) to have any meaning the attempted enforcement by a state official of a statute which conflicts with the 1934 Act breaches a duty. As the Fifth Circuit noted, the lack of prohibitory language in § 28(a) is insignificant.

> The commerce clause, for instance, is written only as an affirmative grant of power to Congress. Without any difficulty, courts find that the language also imposes self-executing limitations on regulation by the State.

577 F.2d at 1271. Therefore, little can be made of Appellants' argument that "all section 28(a) provides is that state regulation which *does not* 'conflict' *is permitted*." Appellants' Brief at 56. Section 28(a), in essence, is a restatement of the Supremacy Clause thus imposing statutory as well as constitutional restrictions on the scope of state regulation.

Even were it necessary to find a "violation" of the 1934 Act as opposed to the breach of a duty imposed by that Act in order to trigger the provisions of § 27, personal jurisdiction over Appellants under that section is proper because the attempted enforcement by a state official of a state law which conflicts with the Act is a "violation" of § 28(a). The commission of a prohibited act constitutes a "violation" of a legislative enactment. *Goodman v. Hentz & Co.*, 265 F.Supp. 440, 447 (N.D. Ill. 1967); *Kardon v. National Gypsum Co.*, 69 F.Supp. 512, *modified on other grounds*, 83 F.Supp. 613 (E.D. Pa. 1946). This Court has also concluded that "a disregard of the command of the statute is a wrongful act. . . ." *Texas & Pacific Railway Co. v. Rigsby*, 241 U.S. 35, 39 (1916). Any activity or transaction

[16] Fifth Circuit Opinion, 577 F.2d at 1271.

which is proscribed by any provision of the 1934 Act is a "violation" for purposes of the Act. In referring to § 16(b) one district court determined that "[i]ndulgence in the prohibited practice was clearly a 'violation' of the Act." *Grossman v. Young*, 70 F.Supp. 970, 971 (S.D.N.Y. 1947).

Appellants argue that as state officials they cannot be said to have "violated" the 1934 Act because this "would lead to the inevitable conclusion that state officials who act to enforce a conflicting state law would be deemed 'wilful violators' of the Act and subject to fine or imprisonment under section 32(a) thereof." Appellants' Brief at 57. However, as the Fifth Circuit concluded, a "violation" for purposes of § 27 need not be a violation for purposes of other sections providing for criminal sanctions. A duty not to enact or enforce conflicting state laws "would not be enforceable through criminal sanctions, but could be violated for purposes of § 27." 577 F.2d at 1272. In *Gratz v. Claughton*, 187 F.2d 46 (2d Cir. 1951) the court, in a case under § 16(b) of the 1934 Act, stated:

> The section forfeits the profits because it forbids dealings in the shares. Nobody is obliged to become a director, an officer, or a "beneficial owner"; just as nobody is obliged to become the trustee of a private trust; but, as soon as he does so, he accepts whatever are the limitations, obligations and conditions attached to the position, and any default in fulfilling them is as much a "violation" of law as though it were attended by the sanction of imprisonment.

Id. at 49. Thus, a "violation" of the 1934 Act was recognized in a situation where the violation could not result in the imposition of criminal sanctions. *See*, II L. Loss, Securities Regulation at 1044-45 (2d ed. 1961). Enforcement of the Idaho Act against GWU and Texas shareholders of Sunshine is an act committed in Texas which constituted an integral part of the Appellants' enforcement of an unconstitutional

state statute. The enforcement of the Idaho statute affected GWU in Texas and, as a consequence of the enforcement of that statute, GWU's business activities within Texas and with persons in other states besides Idaho were restrained. All of this was a direct result of Appellants' derogation of their duty not to enforce a statute in conflict with the Williams Act.

1.

"Minimum Contacts" Analysis Is Unnecessary In Determining Whether The Trial Court Had Personal Jurisdiction Over Appellants In Accordance With § 27 Of The 1934 Act

Only the territorial limits of the United States circumscribe the validity of federal process. Just as a state has power over the persons within its territorial limits, the United States has power over those within its territorial limits. *First Flight Co. v. National Carloading Corp.*, 209 F.Supp. 730, 736 (E.D. Tenn. 1962). In *Kramer v. Scientific Control Corp.*, 365 F.Supp. 780 (E.D. Pa. 1973), an action brought under the antifraud provisions of the federal securities laws, the court concluded that minimum contacts due process analysis is appropriate to determine whether a nonresident defendant is subject to the provisions of a state's long-arm statute but serves no purpose where a plaintiff in a federal court asserts a right under a federal statute which provides for nationwide service of process.

> . . . regarding the claim of insufficient minimum contacts with this district, it must be remembered that the United States is one jurisdictional area, even though it may be divided into fifty states and numerous judicial districts. Congress does not have to resort to the concept of a "long-arm" statute which brings into play considerations of "presence" or "minimum contacts"

> when the issue of eligibility to be served by state process is a question in a litigation. Rather, Congress has the power to provide for the reach of service of process to the outer limits of the reach of its legislative power which, of course, is anywhere in the United States or its territories. *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 442 . . . (1946). If suit under the Federal securities anti-fraud acts and the rules thereunder is brought in a Federal court, the purchaser has the privilege of nationwide service of process. . . . The issue here is not one of constitutional due process but one of compliance with the statute and the Federal Rules of Civil Procedure.

Id. at 787. *Fitzsimmons v. Barton*, 589 F.2d 330 (7th Cir. 1979) was an appeal from a district court's dismissal of a defendant in a federal securities fraud action for lack of personal jurisdiction. The district court had concluded that the defendant lacked sufficient minimum contacts with the State of Illinois to satisfy the requirements of its long-arm statute. The Seventh Circuit concluded that the due process requirement that a nonresident defendant must have minimum contacts with the forum state to be amenable to personal jurisdiction did not apply to a claim based on the 1934 Act.

> Here the sovereign is the United States, and there can be no question but that the defendant, a resident citizen of the United States, has sufficient contacts with the United States to support the fairness of the exercise of jurisdiction over him by a United States court.
>
> This analysis and conclusion has been well established since *United States v. Union Pacific R.R.*, 98 U.S. 569 (1878). There the Supreme Court, in upholding the *in personam* jurisdiction of a circuit court in a federal action against parties residing outside the state in which the circuit court sat, noted:
>
> > The jurisdiction of the Supreme Court and the Court of Claims is not confined by geographical boundaries. Each of them, having by the law of its organization jurisdiction of the subject matter of a suit, and of the parties thereto, can, sitting at Washington, exercise its power by appropriate process, served anywhere within the limits of the territory over which the federal government exercises dominion. . . .
>
> *Id.* at 603. . . . This conclusion has been specifically applied to uphold the validity of nationwide service of process under § 27 of the 1934 Securities Exchange Act. In *Mariash v. Morrill*, 496 F.2d 1138 (2d Cir. 1974), the Second Circuit upheld under § 27 the jurisdiction of a federal district court in New York over a defendant served in Massachussetts stating:
>
> > [W]here, as here, the defendants reside within the territorial boundaries of the United States, the "minimal contacts," required to justify the federal government's exercise of power over them, are present. Indeed, the "minimal contacts" principle does not, in our view, seem particularly relevant in evaluating the constitutionality of in personam jurisdiction based on nationwide, but *not* extra-territorial service of process. It is only the latter, quite simply which even raises a question of the forum's power to assert control over the defendant.
>
> *Id.* at 1143.

Fitzsimmons at 333-4. To the same effect is *Stern v. Gobeloff*, 332 F.Supp. 909 (D. Md. 1971). In the context of 1934 Act cases, due process requirements become significant only if the sovereign, *i.e.*, the United States in such a federal cause of action, attempts to provide for personal service of process on a nonresident foreigner. *Id.; Fitzsimmons* at 334 n.4 ("service beyond the bounds of the territorial United States obviously raises questions as to the contact of the defendant with the United States, questions that are absent when a United States citizen is served within the country"). There-

fore, any act sufficient to constitute an offense within the forum district is adequate to authorize extraterritorial service of process.

2.

Personal Jurisdiction Of Appellants Was Properly Obtained Even If Minimum Contacts Analysis Is Applied To Suits Involving Claims Brought Under § 27 Of The 1934 Act

A foreseeable consequence which occurs in the forum district is sufficient to permit extraterritorial service of process over the entity which caused the result. *See, Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1340 (2d Cir. 1972) (this proposition is more fully explored, *infra*, in the discussion of the applicability of the Texas Long-Arm Statute in this case). In *Travis v. Anthes Imperial Limited*, 473 F.2d 515 (8th Cir. 1973), plaintiffs, American shareholders of a Canadian corporation, charged various defendants with misrepresentations in regard to a tender offer. The court declared that "personal jurisdiction can be acquired over the defendants who have acted within the district or *sufficiently caused foreseeable consequences* by service of process on them in Canada." (Emphasis supplied) *Id.* at 529. Where the consequence of a defendant's activities has substantial impact on the operation of a corporation in the forum district, venue under § 27 is established and

> Once it is established that venue is proper in the district in which the action under the 1934 Act is brought, service of process properly made is sufficient under Section 27 to establish *in personam* jurisdiction over the defendants even if they are not physically present in the forum and have not personally engaged in acts or transactions within the forum.

S-G Securities Inc. v. Fuqua Investment Co., supra, at 94, 932.

On March 25, 1977, Melvin J. Baptie, Idaho's Deputy Administrator-Securities of the Department of Finance, mailed a letter to GWU's counsel in Dallas, Texas commenting on the registration statement filed in Idaho by GWU, which consisted of the Schedule 13D filed with the SEC. In that letter he requested substantial additional information from GWU in addition to that contained in the Schedule 13D. He advised that should GWU decide not to file the requested information the Director of the Department of Finance was prepared to initiate a hearing to determine whether GWU had made sufficient disclosure. Accompanying the letter was an Order summarily issued by Appellant McEldowney which, in effect, enjoined GWU's proposed interstate cash tender from being made anywhere in the nation. This letter, received in the Northern District of Texas by GWU, was more than an immaterial part of Appellants' restraint of GWU's proposed interstate tender offer. The letter and Order were a signicant facet of Appellants' breach of their duty not to enforce state statutes which conflict with the 1934 Act. Therefore, the transmission of these documents into Texas supports personal jurisdiction over Appellants as well as venue in the Northern District of Texas under § 27 of the 1934 Act.

The Appellants' attempted enforcement of the Idaho statute foreseeably caused grave economic consequences to GWU in Texas and precluded the conduct of commercial activities within Texas and between Texas and states other than Idaho. As is demonstrated, *infra*, in the discussion of the applicability of the Texas Long-Arm Statute, these consequences of the attempted enforcement of a statute having extraterritorial impact were sufficient to support personal jurisdiction over Appellants in the Northern District of Texas.

IV.

THE TEXAS LONG-ARM STATUTE SUBJECTED APPELLANTS TO PERSONAL JURISDICTION IN THE NORTHERN DISTRICT OF TEXAS

1.

Jurisdiction Pursuant To The Texas Long-Arm Statute Is As Broad As Federal Due Process Permits

The Texas Long-Arm Statute, TEX. REV. CIV. STAT. ANN., art. 2031b (Vernon 1964)[17], is an effort by Texas to reach as far as federal constitutional requirements of due process will permit in exercising *in personam* jurisdiction over nonresident defendants. *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760 (Tex. 1977); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974).

The propriety of personal jurisdiction in a federal court which employs a long-arm statute depends upon whether the statute purports to confer jurisdiction and whether the assertion of such jurisdiction accords with constitutional principles of due process. *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1286 (9th Cir. 1977). *U-Anchor* unequivocally instructs that jurisdictional determinations in Texas courts depend solely upon the scope of the United States Constitution, thus placing the imprimatur of the Texas Supreme Court on the approach to personal jurisdiction in Texas which numerous federal courts had previously adopted. In *Southern National Bank v. TriFinancial Corporation*, 317 F.Supp. 1173, 1191 (S.D. Tex. 1970), the court indicated that a determination of the scope of the Texas Long-Arm Statute "reduces to due process, for the Long-Arm of Texas has as great a reach as due process permits." Because of this authoritative interpretation of the Texas Long-Arm Statute its scope should be considered coextensive with the outer limits of due process. If constitutional principles would permit the exertion of personal jurisdiction, article 2031b purports to apply.

However, Appellants argue that the long-arm statute does not, by its terms, apply to the situation at bar because state officials attempting to enforce a state statute cannot be "doing business" as that phrase is used in the statute. There is no reason to suppose that the phrase "doing business" as used by the Texas Legislature was intended to be limited only to proprietary or commercial activities as Appellants suggest. Quite to the contrary, the statute refers not only to contracts and torts but also provides that it applies to ". . . other acts that may constitute doing business. . . ." The commission of a tort is not commercial activity but is deemed to be "doing business" for purposes of the Texas statute. "The words of the statute are that 'the committing of any tort in whole *or in part*' in Texas is sufficient to constitute 'doing business,' the predicate for long-arm jurisdic-

[17] Article 2031b provides in pertinent part:

> Sec. 3. Any . . . non-resident natural person that engages in business in this State, irrespective of any Statute or law respecting designation or maintenance of resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such . . . non-resident natural person of the Secretary of State of Texas as agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such . . . non-resident natural person is a party or is to be made a party.
>
> Sec. 4. For the purpose of this Act, *and without including other acts that may constitute doing business*, any . . . non-resident natural person shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State. (Emphasis supplied).

tion." *A. L. Black v. Acme Markets, Inc.*, 564 F.2d 681, 685 (5th Cir. 1977). The Texas statute was designed to provide a forum for Texas residents who are injured by the conduct of nonresidents, not merely to regulate commercial activities. The district judge in this case correctly determined that "'[d]oing business' under § 2031b includes all acts or omissions which subject the defendant to the exercise of jurisdiction by Texas courts; the terminology has no commercial import."[18] Indeed, the prototype of all long-arm statutes, nonresident motorist statutes, were completely unrelated to any commercial, profit-oriented activities on the defendant's part. *See, Hess v. Pawlowski*, 274 U.S. 352 (1927); 2 J. MOORE'S FEDERAL PRACTICE ¶ 4.41-1[2] (2d ed. 1977).

U-Anchor's pronouncement that the Texas statute is designed to go to the limits of due process is predicated upon the fact that "such a construction is desirable in that it allows the courts to focus on the constitutional limitations of due process rather than to engage in technical and abstruse attempts to consistently define 'doing business'." 553 S.W. 2d at 762; *see*, Thode, *In Personam Jurisdiction; Article 2031b, the Texas "Long-Arm" Jurisdiction Statute; and the Appearance To Challenge Jurisdiction in Texas and Elsewhere*, 42 TEX. L. REV. 279 (1964). Thus, the proper inquiry for a court is whether sufficient minimum contact exists rather than whether a technical definition of "doing business" is met. Nevertheless, "Idaho's 'business' is to regulate. It was conducting that business in Texas." Fifth Circuit Opinion 577 F.2d at 1268. Thus, the Fifth Circuit properly framed the issue presented in this case:

> The question is whether due process permits a court in Texas to exercise jurisdiction of the Idaho official who has enforced the Idaho takeover law to prevent a Texas-based corporation from proceeding with a national tender offer.

[18] District Court's Findings and Conclusions of Law at 6.

577 F.2d at 1266.

2.

Appellants Had Sufficient Minimum Contacts With Texas To Justify In Personam Jurisdiction

It is axiomatic that a nonresident defendant is subject to the jurisdiction of a federal court by virtue of the application of a state long-arm statute if he has sufficient minimum contacts with the forum so that the imposition of jurisdiction does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). As it pertains to the application of the Texas Long-Arm Statute, the due process standards enunciated in *International Shoe* require that:

> First "there must be some minimum contact with the state which results from an affirmative act of the defendant." Secondly, "it must be fair and reasonable to require the defendant to come into the state and defend the action." 2 Moore[']s Federal Practice] note 16, § 4.25[5] at 1171-72.

Product Promotions Inc. v. Cousteau, 495 F.2d 483, 494 (5th Cir. 1974).

a.

Appellants Engaged In Purposeful Activity.

Appellants argue that the *International Shoe* due process standards apply exclusively to commercial, profit-oriented enterprise because those standards require that a defendant must perform some act "by which [it] purposefully avails itself of the privilege of conducting activities within the forum State thus invoking the benefits and protections of its

laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The purpose of these requirements is really to insure that the unilateral activity of a plaintiff who claims a relationship with a nonresident will not support jurisdiction. The standards are designed to focus attention on the conduct of the defendant to assure that his "contacts with the forum were deliberate rather than fortuitous . . . ." *Product Promotions, supra*, at 496. As the Fifth Circuit noted,

> Personal jurisdiction has been found to exist over price fixing conspirators whose illegal activities in one state were designed to control prices in the forum state. *Hitt v. Nissan Motor Co., Ltd*, 1975 S.D. Fla., 399 F. Supp. 838, *vacated on other grounds*, 5 Cir. 1977, 552 F.2d 1088; *Maricopa County v. American Petrofina, Inc.*, 1971 N.D. Cal., 322 F. Supp. 467. Those conspirators, of course, had not invoked the benefits and protections of the forum state's laws in a restrictive sense.

577 F.2d at 1268-69. Thus, the proper focus of inquiry is whether the defendants "engage[d] in some purposeful activity in this State or have inflicted injuries upon, or incurred obligations to, those entitled to legitimate protection." *Darden v. Heck's, Inc.*, 459 F. Supp. 727, 731 (W.D. Va. 1978). Appellants cannot be heard to argue that they did not purposefully undertake to enforce the Idaho Act. This attempted enforcement had a significant impact in Texas.

b.

Appellants Caused Reasonably Foreseeable Consequences In Texas.

Lower federal courts and state courts have uniformly considered it possible to satisfy the "minimum contacts" test if it is established that a defendant engaged in activity outside the forum state which caused reasonably foreseeable consequences within the state. *See, e.g., State ex rel Sperandio v.*

Clymer, 568 S.W.2d 935 (Mo. 1978); *A. L. Black v. Acme Markets, Inc., supra.* In *Black* the Fifth Circuit referred to its decision in *Eyerly Aircraft Co. v. Killian*, 414 F.2d 591 (5th Cir. 1969) and noted that "because the wrongful act outside Texas produced reasonably foreseeable harm within Texas, personal jurisdiction was proper." 564 F.2d at 686. Jurisdiction of a nonresident defendant who has caused a consequence within the forum state meets due process muster if the following three questions are answered in the affirmative:

> Did defendant purposefully avail itself of the privilege of acting in Texas or *causing a consequence there*? Did the cause of action arise from such activities? Do such activities "have a substantial enough connection with . . . [Texas] to make the exercise of jurisdiction over defendant reasonable?" (Emphasis supplied).

Southern National Bank v. TriFinancial Corporation, supra, at 1191. This three-pronged test was applied by the Sixth Circuit in *Southern Machine Company, Inc. v. Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968), a declaratory judgment action based upon patent rights. The court declared that an economic impact upon the plaintiff in the forum state, reasonably foreseeable by defendants, supplied the requisite "consequence" to confer *in personam* jurisdiction.

> Today, it can no longer be doubted, if it ever was, that the doing of an act or the causing of a consequence in the forum state by the defendant can satisfy the requirements of the "minimum contacts" test. (notes omitted)

Id. at 380.

Appellants argue that this Court's decision in *Kulko v. Superior Court*, 436 U.S. 84 (1978), renders the "effects" test inapplicable to the instant case because the effects test is to be applied only where the defendant derives a benefit

from his activities relating to the forum state. But the question of whether the defendant derived a benefit from his contacts with the forum state is merely one way to determine whether he undertook any purposeful activities with a connection to that state. This Court states in *Kulko* "we cannot accept the proposition that appellant's acquiesence in [his daughter's] desire to live with her mother conferred jurisdiction over appellant in the California courts in this action." The fact that he received no benefit merely indicated that his acquiesence did not constitute purposeful activity. Such "acquiesence" is vastly different from Appellants' purposefully conducting regulatory activities beyond the boundaries of their state. It is also paradoxical that Appellants contend that they received no benefit from their activities relating to Texas, Appellants' Brief at 50, and at the same time assert that they have a "property right" to exercise their statutory obligation to enforce Idaho law. Appellants' Brief at 44. Nevertheless, the receipt or expectation of a benefit from one's activities with the forum state is merely an indicator of the purposefulness of his activity rather than a prerequisite for the applicability of a "consequences" test.

Relying on the restraint of personal freedom of the plaintiff which was caused in Wisconsin by the use of the FBI's NCIC information system by government officials residing in Louisiana, the district court in *Maney v. Ratcliff*, 399 F.Supp. 760 (E.D. Wis. 1975), *supra* at 41, determined that personal jurisdiction over the nonresident officials depended upon their "contacts" with Wisconsin irrespective of whether they received any economic benefit from their contacts with the forum.

> Defendants' position that the long-arm statute is inapplicable is based on their contentions that the statute

> was not intended to apply to the use of the NCIC system by police and prosecutors, and that the "contacts" with Wisconsin were initiated for the purpose of enforcing Louisiana's criminal laws rather than for the defendants' economic self-benefit.
>
> This position must be rejected. Although the Wisconsin legislature may not have contemplated the application of the long-arm statute to the facts alleged in this action, in the absence of any statutory provision or legislative history forbidding the statute's application, and so long as the facts are within the statute's language, the novelty of the factual situation is not a sufficient basis for ruling that the long-arm statute is inapplicable. Moreover, nothing in the long-arm statute makes the motive for a defendant's activities determinative of the statute's application. If the defendants' actions fall within the language of the long-arm statute, and if they constitute sufficient "minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice,'" *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945), then personal jurisdiction may be exercised over them.

Id. at 767.

c.

Personal Jurisdiction Was Reasonable Because of the Substantial Connection Of Appellants' Activities With Texas.

Appellants argue that this Court's recent decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977) proscribes the assertion of jurisdiction sanctioned by the courts below. But that case did not alter the standards applicable to minimum contacts analysis, it simply applied them in a new context as demonstrated by the very passage Appellants quote in their Brief at 44. In *Shaffer* this Court concluded that the minimum contacts standards of *International Shoe* apply to *in rem* as well

as *in personam* actions. As Justice Marshall, writing for the Court, stated: "We think that the time is ripe to consider whether the standard of fairness and substantial justice set forth in International Shoe should be held to govern actions *in rem* as well as *in personam*." 433 U.S. at 206. And the result reached was that "we therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny." *Id.* at 212. This Court was addressing the propriety of a state court's assertion of jurisdiction based solely on the presence of property within the state. *Id.* at 211. Therefore, it is of no moment whether or not "the effect of the holdings below is, in essence, to affect the property right of elected and appointed officials to exercise their statutory obligation to enforce Idaho law." Appellants' Brief at 44. For *Shaffer* to even address the instant case, that "property right" Appellants claim in their obligation to enforce state law would have to be a property right the situs of which was in Texas and the District Court would have had to assert jurisdiction *in rem* on the basis of the location of that property right. *Shaffer v. Heitner* is wholly inapposite to the case at bar.

Appellants suggest that application of a consequences test to determine their amenability to jurisdiction under due process standards would "cast[ ] a pall over attempts to enforce state laws generally." Appellants' Brief at 46. They pose the following hypothetical situation:

> . . . California officials who applied that state's air quality laws — which impose a higher emission standard than applicable federal law — to automobiles coming into California from any source could be required to appear in federal court in Michigan to defend there a constitutional challenge to the validity of the California laws in an action brought by a Michigan auto manufacturer. Grounds for assertion of Michigan jurisdiction would be that the California laws had a "practical, extra-territorial effect" or "consequences" in Michigan or "amounted to the regulation" of the auto manufacturer's Michigan-based business activities.

Appellants' Brief at 46. This argument fails to distinguish between residual extraterritorial effects of state regulation and the consequences of a state's direct regulation of activities beyond its borders, *see, supra* at 36. California may indeed impose the standards it believes proper and those who would do business *in that state* must meet those standards. The instant case, however, is more analogous to the situation which would be presented if California passed an emission law and required that its provisions be met by all cars sold by Michigan manufacturers to Texas purchasers, and unless the provisions of that statute were met, no sale of the automobiles could be consummated anywhere.

In addition to the effects Appellants caused in Texas, the Deputy Administrator sent to GWU in Texas a letter of comment and Order, see, *supra at 53*, which restrained the commencement of its offer. Because these documents represented the vehicle by which Appellants enjoined the offer, they constituted sufficient minimum contacts with Texas to support personal jurisdiction in this case. As the Fifth Circuit has said:

> Since Travelers Health Ass'n v. Virginia, 1950, 339 U.S. 643 . . . and McGee v. International Life Insurance Co., 1957, 355 U.S. 200 . . . it is established that correspondence alone may establish sufficient contacts with the state to subject a nonresident to a suit in that state on a cause of action arising out of those contacts.

Calagaz v. Calhoon, 309 F.2d 248, 256 (5th Cir. 1962).

The extraterritorial effects of the Idaho Act are consequences of Appellants' enforcement of an unconstitutional state statute. The consequences of enforcement occurred in the Northern District of Texas, GWU's principal place of business. These consequences were reasonably foreseeable by the Appellants and therefore support personal jurisdiction pursuant to the Texas Long-Arm Statute. A state has a vital interest in protecting its citizens where activities conducted out of state injure them within the state. How much greater is the state interest where its citizens are injured by such out-of-state activity and the state's own sovereignty is impugned by a sister state's attempt to enforce its statutes extraterritorially.

V.

VENUE IS PROPER IN THE NORTHERN DISTRICT OF TEXAS PURSUANT TO SECTION 27 OF THE 1934 ACT

Section 27 of the 1934 Act provides that venue lies, among other places, in the district in which any act or transaction constituting the violation of the Act occurred. This provision does not require that the act which occurred in the district constitute the core of the claim. All that is required is that the act within the forum district be more than an immaterial part of the wrongful act. *Jacobs v. Hanson*, [CURRENT] FED. SEC. L. REP. (CCH) ¶96,770 at 95,033 (D. Del. February 6, 1979).

> To establish venue under Section 27, "[i]t is only necessary to show that an act in furtherance of the unlawful plan was committed within the district. . . ." *Wharton v. Roth*, 263 F.Supp. 922, 923 (E.D.N.Y. 1964). *See Hooper v. Mountain States Securities Corporation*, 282 F.2d 195 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961). The venue-sustaining act need not constitute the core of the alleged violation, *Sohns v. Dahl*, 392 F.Supp. 1208, 1215 (W.D.Va. 1975), nor even be illegal, *Mayer v. Development Corp. of America*, 396 F.Supp. 917, 929 (D. Del. 1975), so long as "it represents more than an immaterial part of the alleged violations." *Sohns v. Dahl, supra*, 392 F.Supp. at 1215.

S-G Securities, Inc. v. Fuqua Investment Co., [CURRENT] FED. SEC. L. REP. (CCH) ¶96,750 at 94,932 (D. Mass. December 19, 1978). That court then concluded that the fact that consequences of the defendants' activities had substantial impact on the operation of the plaintiff corporation's headquarters was sufficient to confer venue in the district where its headquarters was located. *Id.* In *Travis v. Anthes Imperial Limited*, 473 F.2d 515, 529 (8th Cir. 1973), the Eighth Circuit determined that venue in the district court was proper, in part, because "whatever consequences there were in the United States from actions in Canada were felt in [that] district." Similarly, the Fifth Circuit determined, the effects of Appellants' activity were felt by GWU in the Northern District of Texas where its principal place of business is located. Furthermore, the mailing of the Idaho comment letter and Order, *see, supra* at 53, 63, was a substantial act in furtherance of Appellants' restraint of GWU's proposed offer. The receipt of these documents by GWU at its corporate headquarters in Dallas, Texas thus supports the propriety of venue in the Northern District of Texas.

Just as "[i]t is hornbook law that one of the elements of a tort is damage and plaintiffs here have alleged damage within the State of Texas," *A. L. Black v. Acme Markets, Inc.*, 564 F.2d 681, 685 (5th Cir. 1977), the crucial element of the attempted enforcement of an unconstitutional state statute is the restraint and resulting harm to the entity against which it is enforced. Where an act has occurred in the dis-

trict sufficient to support personal jurisdiction, venue is likewise proper. The effects of Appellants' activities in the Northern District of Texas are sufficient to support venue there regardless of whether they were physically present in that district or personally engaged in acts or transactions there. *S-G Securities* at 94, 932; *Warren v. Bokum Resources*, 433 F.Supp. 1360 (D. N.M. 1977); *Hilgeman v. National Insurance Company of America*, 547 F.2d 298, 302 n.11 (5th Cir. 1977).

VI.

VENUE IN THE NORTHERN DISTRICT OF TEXAS WAS PROPER UNDER 28 U.S.C. § 1391(b).

Where subject matter jurisdiction is not based solely upon diversity of citizenship, 28 U.S.C. § 1391(b)[19] is the applicable general venue statute. Wherever compulsory process is available, venue under the general venue statutes should also be proper.

> This equation of the availability of compulsory process on a nonresident and proper venue under § 1391(a) would have three advantages. First, it would minimize the number of instances in which a plaintiff is put to the election of foregoing protections afforded him by a state with sufficient connection with the subject matter to justify it in exercising compulsory jurisdiction over the defendant, or shifting the choice of state or federal forum to the defendant. Second, in cases in which the defendant is sued in an inconvenient forum, it would broaden the choices available under § 1404(a) as interpreted in *Hoffman v. Blaski*. [363 U.S. 335 (1960)]

[19] 28 U.S.C. § 1391(b) provides:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

> Third, it would shift the issue in motions for transfer from the largely technical questions of which fact of perhaps many that underlie a claim marks the place at which the claim arose toward the considerations of convenience that underlie the venue concept.

1 J. MOORE'S FEDERAL PRACTICE ¶0.142 [5.-2] at 1430 (2d ed. 1977). The same reasoning applies to § 1391(b). Furthermore, as has been discussed, *supra*, in connection with the applicability of § 27 of the 1934 Act, a claim arises where injury is suffered. "In personal injury actions . . . if it is necessary to choose between the place of injury and the place of the negligent acts or omissions, the place the claim arises should be held to be the place of injury." *Id.* at 1434. As the Fifth Circuit aptly observed:

> The core of Great Western's claim is that the Idaho officials invalidly prevented Great Western from initiating any tender offer for Sunshine. The offer was initiated in Dallas, Texas. If there is a single place where the allegedly invalid restraint occurred, that place is Dallas. Although the result of Idaho's regulation was that Great Western could not make an offer to Sunshine shareholders who reside in districts throughout the country, the place of restraint, and thus the place where Idaho officials injured Great Western, was in Dallas.

577 F.2d at 1273. Applying a "weight of contacts" test to determine the propriety of venue, *see, Commercial Lighting Products, Inc. v. United States District Court*, 537 F.2d 1078 (9th Cir. 1976), venue properly lay in the Northern District of Texas. Appellants' attempt to refute this proposition by arguing that "though the effect on the plaintiff herein was felt in Texas, the acts by the Idaho defendants all occurred in Idaho, and Idaho is the district in which the defendants performed their official duties." Appellants' Brief at 64. But, as has been discussed at length, the key to

the instant case is the fact that Appellants were not performing their official duties in Idaho, as they should, but were acting extraterritorially by their attempt to enforce the Idaho Act. In the closely analogous case of *Maney v. Ratcliff*, 399 F.Supp. 760 (E.D. Wis. 1975), *supra* at 41, 60, the defendant officials had undertaken action in Louisiana, but the harm was visited upon the plaintiff in Wisconsin. The court stated:

> As used in 28 U.S.C. § 1391(b), "claim" means "the aggregate of operative facts giving rise to a right enforceable in the courts . . ." *Ryan v. Glenn*, 52 F.R.D. 185, 192 (N.D. Miss. 1971). *See, Original Ballet Russe v. Ballet Theatre*, 133 F.2d 187 (2d Cir. 1943); 1 Moore's Federal Practice ¶ 0.142 [5.-2], at 1423-1435 (2d ed. 1974). The operative facts of each of plaintiff's three claims include the presence of the Baton Rouge NCIC entry, an arrest and detention based on the entry, and the subsequent failure of the Baton Rouge authorities to forward extradition papers. While the defendants' alleged acts and omissions occurred in Louisiana, the arrests and detentions occurred in Wisconsin and New York. These injuries are part of the claims plaintiff seeks to litigate.

Id. at 766. The Court upheld venue, as well as personal jurisdiction, over the nonresident officials. Such extraterritorial effect of acts by government officials is precisely the case presented to this Court.

Similarly, the important consideration in the present case is not where Appellants concluded to take the action they ultimately took. The injury of which GWU complained was the application and enforcement of the Idaho Act, not the determination that the Act should apply. In *Brotherhood of Locomotive Engineers v. Denver & Rio Grande Western R. R. Co.*, 290 F.Supp. 612, 616 (D.Colo. 1968), *aff'd*, 411 F.2d 1115 (10th Cir 1969), the defendants included the National Mediation Board ("NMB"), an executive agency of the Federal Government, and the individual members of the NMB. The court concluded that the claim arose and, hence, venue was proper in the district where the NMB's order had its effect rather than in the district in which it was issued.

> . . . Any claim that might exist against the NMB for injunctive relief should also be considered as arising in this district. Though the particular action which plaintiff seeks to enjoin would be taken in the District of Columbia where the NMB is headquartered, the impact and operation of any such action will be felt in this district and it is here, therefore, that the cause of action arises.

Id. at 616. *See generally*, Comment, *Federal Venue: Locating the Place Where the Claim Arose*, 54 TEX L. REV. 392, 403-10 (1976).

The propriety of venue in the Northern District of Texas is underscored by the posture of this case as originally brought. Officials of New York, as well as Idaho, indicated they would assert jurisdiction over GWU's offer. Maryland could not decide the jurisdiction issue without a hearing. Had all three states asserted jurisdiction, there would have been no district in which all defendants resided. Only in the Northern District of Texas, the focal point of the regulatory activity, could the entire controversy be tried in a single suit. The very purpose of the provision permitting suit to be brought where the claim arose was "to assure that at least one venue . . . will be proper as to all defendants . . . in a multi-party action." 1 J. MOORE'S FEDERAL PRACTICE ¶ 0.142 [5-2] at 1434 (2d ed. 1977). And the Fifth Circuit stated:

> There is no reason to conclude that the claim against New York or Maryland arose in Idaho. The district judge would have placed the claim in Idaho only be-

> cause Idaho was the source of the power exerted extra-territorially. Idaho would not have been the source of New York's or Maryland's power. In contrast, if New York or Maryland officials had asserted jurisdiction, the reasons why we believe Great Western's claim against the Idaho officials arose in Dallas would equally apply to them, and a single suit would have been possible.

577 F.2d at 1274.

The extraterritorial enforcement of the Idaho Act injured and restrained GWU in Texas. For purposes of § 1391(b), the instant claim arose in the Northern District of Texas.

VII.

FEDERAL SECURITIES REGULATION PREEMPTS THE IDAHO ACT

The Idaho Act is invalid under the Supremacy Clause of the United States Constitution, U.S. CONST. art. VI, § 2. To give effect to the Supremacy Clause (especially in light of the congressional power to regulate interstate commerce), the courts have developed the doctrine of federal preemption. Under this doctrine, when congressional legislation conflicts, either expressly or implicitly, with state regulation, the latter is inoperative. *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 156 (1942).

This Court, in *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977) has recently summarized the nature of the inquiries to be made to determine whether a state statute is void under the Supremacy Clause.

> The first inquiry is whether Congress, pursuant to its power to regulate commerce, U. S. Const., Art. 1, § 8, has prohibited state regulation of the particular aspects of commerce involved in this case. . . . [W]hen Congress has "unmistakably . . . ordained," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633, 93 S.Ct. 1854, 1859, 36 L.Ed.2d 547 (1973); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. [218] 230, 67 S.Ct. 1152, [91 L.Ed. 1446] [1947].
>
> Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U.S. Const., Art. VI. The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is "to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 339, 404, 85 L.Ed. 581 (1941). Accord, *De Canas v. Bica*, 424 U.S. 351, 363, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976); *Perez v. Campbell*, 402 U.S. 637, 649, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971); *Florida Lime & Avocado Growers v. Paul, supra*, at 141, 10 L.Ed.2d 248, 83 S.Ct. at 1217; *id.*, at 165, 10 L.Ed.2d 248, 83 S.Ct. at 1220 (White, J., dissenting). This inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written. See *De Canas v. Bica, supra*, at 363-365, 47 L.Ed.2d 43, 96 S.Ct. 933; *Swift & Co. v. Wickham*, 230 F.Supp. 398, 408 (S.D.N.Y. 1964), appeal dismissed, 382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965), aff'd on further consideration, 364 F.2d 241 (CA 2 1966, cert. denied, 385 U.S. 1036, 87 S.Ct. 776, 17 L.Ed.2d 683 (1967)).

As held by the Fifth Circuit, 577 F.2d at 1271, the Supremacy Clause was incorporated into the 1934 Act by

Section 28(a) thereof,[20] 15 U.S.C. § 78bb, which provides in relevant part:

> Nothing in this chapter shall affect the jurisdiction of the Securities Commission (or any agency or officer performing like functions) of any State over any security or any person *insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.* (Emphasis supplied).

Thus, the Supremacy Clause is made a statutory as well as a constitutional requirement. Thomas Corcoran, one of the principal draftsmen of the bill which became the 1934 Act, explained that in drafting § 28(a) the intent was to apply well-established principles of preemption:

> The national law drives out all systems insofar as they are inconsistent. That is a situation you always have. A State can legislate additionally to the Federal law, *but it cannot legislate inconsistently with it.*[21]

Appellants boldly assert that Congress reserved to the states under § 28(a) the power to regulate corporate takeover offers in a manner different from that adopted in the Williams Act, and that the states have an inherent power to accomplish such regulation. Appellants' Brief at 66. Certainly, the language of § 28(a), as well as the legislative history of § 28(a), fail to support that assertion. The historical context in which the 1934 Act was adopted further undercuts Appellants' position. At the time the 1934 Act was passed, the Blue Sky movement had spread to 47 states and Hawaii. I L. Loss, SECURITIES REGULATION at 30 (1961). This Court had upheld the constitutionality of state Blue Sky laws on the express ground that they operated only

[20] *Accord:* E. ARANOW, H. EINHORN AND G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL at 225 (1977).

[21] HEARINGS ON S. RES. 84 (72d CONG. AND S. RES. 56 AND S. RES. 97 (73d CONG.), PT. 15, BEFORE THE SENATE COMM. ON BANKING AND CURRENCY ON STOCK EXCHANGE PRACTICES UNDER THE NATIONAL SECURITIES EXCHANGE ACT OF 1934, 73d Cong., 1st Sess. 6577 (1933).

within the state. Hall v. Geiger-Jones Co., 242 U.S. 539 (1917); *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917); and *Merrick v. Halsey & Co.*, 242 U.S. 568 (1917). This trilogy of cases is cited by Appellants to support their observation of "this Court's long-standing recognition of the propriety and constitutionality of the co-existence of federal and state securities regulation." Appellants' Brief at 68. Appellants' statement needs refinement; this Court recognized the rights of the states under their police powers to protect their citizens from abuse in securities transactions within their state borders, and the courts have consistently recognized that state securities laws have no extraterritorial application.[22]

Section 28(a) reserved to the states their traditional role in the regulation of intrastate securities transactions, at a time when there was no federal or state regulation of cash tender offers.[23] Congress adopted the Williams Act in 1968 in response to the utilization of the interstate cash tender offer as a corporate acquisition technique. Prior to that time, there was little federal or state regulation of the field.[24]

[22] *See, supra,* note 14 and accompanying text.

[23] Congressional intention to preempt any state attempt at extraterritorial regulation of securities is further manifested by Section 18 of the 1933 Act, 15 U.S.C. § 77r, which preserved State Securities Commission regulation over the issuance of new securities — the subject of the 1933 Act. The House Committee Report on the 1933 Act stated: "The bill carefully preserves the jurisdiction of state security commissions to regulate transactions *within their own borders.* [H. Rep. No. 85, 73d Cong., 1st Sess., p. 10 (1933) (Emphasis supplied)]."

[24] The paucity of federal and state regulation over the conduct of cash tender offers prior to the adoption of the Williams Act is discussed in Pitt, *Standing to Sue Under the Williams Act after* Chris-Craft: *A Leaky Ship on Troubled Waters,* 34 BUS. LAW. 117, 125-27 (1978). The absence of state regulation of tender offers also demonstrates that this is not a case as Appellants contend in which the Court is asked to "federalize" what has traditionally been a matter of state law. In this case, Idaho seeks to disturb the effects of federal regulation adopted some seven years prior to the effective date of the Idaho Act.

The Williams Act was designed to assist investors confronted with a cash tender offer in making an informed decision about whether to tender their shares. *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975); *Hearings on S.510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 188 (1967) ("*Senate Hearings*"). The Senate Report reflected the prior "gap" which had existed in the federal securities laws.

> The bill [S. 510] would correct the current gap in our securities laws by amending the Securities Exchange Act of 1934 to provide for full disclosure in connection with cash tender offers and other techniques for accumulating large blocks of equity securities of publicly-held companies.[25]

When the Williams Act was passed, only Virginia had a state takeover statute, which became effective March 5, 1968, only a few months prior to the effective date of the Williams Act. Va. Code Ann. §§ 61-4-1 to 13 (Cum. Supp. 1977).[26]

Although the Williams Act contained no express preemption provision, since it was passed as an amendment to the

[25] S. Rep. No. 550, 90th Cong., 1st Sess. 4 (1976). *See also*, Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 YALE L. J. 510, 512 (1979); Sowards and Mofsky, *Corporate Take-Over Bids: Gap in Federal Securities Regulation*, 41 ST. JOHN'S L. REV. 499 (1967).

[26] As noted by the Fifth Circuit, 577 F.2d at 1275 n.39, there is no mention of state legislation in the Senate or House hearings on the Williams Act. Because the state takeover statutes are not of substantially the same character as the Blue Sky laws Congress intended to save, § 28(a) may not have saved to the states any power, even intrastate, over cash tender offers. *See*, Langvoort, *State Tender Offer Legislation: Interests, Effects and Political Competency*, 62 CORNELL L. REV. 213, 249 (1977); Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 212-15 (1959); Hirsch, *Toward a New View of Federal Pre-Emption*, 1972 U. ILL. L. F. 515, 540-41 (1972).

1934 Act it acquired § 28(a)'s prohibition of conflicting state securities regulation. Section 28(a) cannot be read as a reservation to the states of the power to regulate corporate takeover offers *extraterritorially*, if at all. For example, Congress in adopting the McCarran-Ferguson Act, 15 U.S.C. § 1011, expressly left the regulation and taxation of insurance to the states. In *State Bd. of Insurance v. Todd Shipyards*, 370 U.S. 451 (1962), the only contacts with Texas were insured property located in Texas and doing business by the insured in Texas. All other aspects of the issuance of insurance policies and the conduct of the insurance transaction took place outside of Texas. This Court held that the State of Texas could not collect a tax on insurance premiums arising out of the transactions, thus striking down an attempt by a state to regulate insurance *extraterritorially*, even though the McCarran Act expressly provided for state regulation of the business of insurance.

In *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), a Pennsylvania sedition statute proscribed sedition against either the government of the United States or the government of Pennsylvania. The defendant was convicted of sedition against the United States. This Court held that the state statute was preempted by the federal Smith Act, notwithstanding a general congressional expression not to supersede state criminal statutes. *Id.* at 501, n. 10.

Just as Appellants cannot demonstrate any reserved or inherent power to regulate an interstate cash tender offer extraterritorially, Appellants also can find little comfort in the decisions of this Court allowing state statutes to stand where the subject matter involved had been traditionally state-regulated. Thus, in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), a state smoke abatement

statute withstood a preemption claim because of the traditional state authority to regulate for the protection of the health of its citizens. In *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963), a state statute withstood attack on preemption grounds where the state was exercising its traditional control over the distribution and retail sale of food in the interests of its local consumers. In *Kewanee Oil Co. v. Bicron*, 416 U.S. 470 (1974), long-standing state protection of trade secrets was allowed to continue to exist concurrently with the federal regulation of patents. The record before this Court is entirely different. The recent proliferation of state takeover statutes has been a reaction to pre-existing federal regulation in a field in which, prior to 1968, neither Congress nor the state legislatures had attempted to regulate at all.

Nor can Appellants find succor in this Court's decision in *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117 (1973), where state statutes governing wage disputes were held not to interfere with federal policy for the protection of investors. Here, the Idaho Act runs directly afoul of federal policy for the regulation and administration of interstate cash tender offers, and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." It is, therefore, preempted by operation of § 28(a)'s restatement of the Supremacy Clause.

1.

In the Adoption of the Williams Act Congress Struck a Careful Balance By Regulating Tender Offerors and Target Management Evenhandedly

Congress, in passing the Williams Act amendments, adopted a policy of absolute "evenhandedness," dictating that neither the target company nor the tender offeror

would be favored. "Congress was indeed committed to a policy of neutrality in contests for [corporate] control. . . ." *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 29 (1977). The intended beneficiaries of this congressional legislation were the target company shareholders who could best be served by a policy of strict neutrality which gave advantage to neither the incumbent management of the target company nor the tender offeror. *Rondeau v. Mosinee Paper Corp., supra*, at 58-59 (1975). Jeffrey B. Bartell, at the time of trial a Commissioner of Securities for the State of Wisconsin, testified that Senator Williams and other draftsmen of the Williams Act "felt it was important to equalize the balance between offeror and target company by providing a regulatory scheme pursuant to which the shareholders would ultimately benefit." (A. 223). Francis Wheat, a former Commissioner of the SEC, testified on behalf of Appellants to the same effect. (A. 271 to A. 272).

The Williams Act reflects a congressional policy to regulate, not eliminate, tender offers. During the course of extensive hearings, Congress recognized that takeover bids frequently serve a "useful purpose in providing a check on entrenched but inefficient management." H. R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968); *see, e.g., Senate Hearings at* 114-19, 136-39, 165-75. Congress concluded that the Williams Act should be implemented in such a manner so that "takeover bids should not be discouraged" S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967).

In implementing the Williams Act, the courts have carefully maintained the congressional policy of equal treatment of the competing parties.

> *The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids to prevent large accumulations of stock which would create the potential for such attempts.* Indeed,

> the Act's draftsmen commented upon the "extreme" care which was taken "to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." (Emphasis supplied, notes omitted).

Rondeau v. Mosinee Paper Corp., supra, at 58-59.

> Congress intended to assure basic honesty and fair dealing, not to impose an unrealistic requirement of laboratory conditions that might make the new statute a potent tool for incumbent management to protect its own interests against the desires and welfare of the stockholders.

Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 947-48 (2d Cir. 1969).

Thus, the Williams Act, adopted for the purpose of protecting shareholders, operates in a fashion which is neither pro-management nor pro-tender offeror.

2.

The Intent of Congress to Strike a Regulatory Balance is Reflected in the Legislative History of the Williams Act

Pre-effective Filing. In 1965 Senator Harrison Williams introduced the first legislative proposals for regulation of tender offers as such. His initial bill would have imposed far more onerous burdens on the offeror than the legislation Congress ultimately enacted. Any person making an offer which, if successful, would have resulted in ownership of *more than 5%* of the stock of the target corporation would have been required to file certain information *with the target company* and with the SEC *20 days in advance* of the offer to shareholders. S. 2731, 89th Cong., 1st Sess. (1965); *cf.* H.R. 14417, 89th Cong., 2d Sess. (1966). The SEC submitted

a memorandum to the Senate Banking and Currency Committee critical of this approach, and suggested instead that an offeror be required to file a confidential statement[27] with the SEC five days before the offer was to be made to shareholders. 112 Cong. Rec. 18170-71 (1966). No action was taken on the proposal in that session.

Senator Williams subsequently introduced a bill (S. 510) in the 90th Congress following the SEC's recommendation. His introductory remarks stressed points which are vital to an understanding of the legislation which became the Williams Act:

> This measure is not aimed at obstructing legitimate takeover bids. In some instances, a change in management will prove a welcome boon for shareholder and employee, and in a few severe situations, it may be necessary if the company is to survive.
>
> I have taken extreme care with this legislation to balance the scales equally to protect the legitimate interests of the corporation, management, and shareholders without unduly impeding cash takeover bids. Every effort has been made to avoid tipping the balance of regulatory burden in favor of management or in favor of the offeror.

113 Cong. Rec. 854 (1967).

Notwithstanding these assurances, the bill's congressional sponsors and the SEC met with some opposition in Congress. Representatives of the New York Stock Exchange and the American Stock Exchange testified at length. *Senate Hearings* at 69-106. They expressed concern that the 5-day advance filing with the SEC could result in leaks which would

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[27] The Williams Act from its earliest drafts required disclosure of the very items in Section 13d(1) which applied at the time GWU announced its proposed tender offer.

be extremely disruptive to the securities market and destructive of tender offers:

> Any legislation that increases the chances of premature disclosure of an impending offer can only serve to thwart the use of tender offers. These offers may be of great benefit not only to the stockholders whose stock is being sought, but to those of the company making the offer.

Id. at 72.

The bill also was criticized by a panel of professors for placing unwise and undue burdens on tender offers, which they regarded as useful devices in ousting inefficient management. *Senate Hearings* at 117-128.[28]

Reflecting the force of these arguments, the bill, as reported out of Committee, did not contain the 5-day advance filing provision. As enacted in the summer of 1968, the Williams Act contained no requirement whatsoever that an offeror make disclosure to any government agency in advance of the offer to shareholders.[29]

This idea of advance notice, however, did not die, at least in the minds of its advocates. In January of 1969, Congressman Monagan introduced a bill to amend the Williams Act to require a 30-day advance filing with the target company and the SEC. 115 Cong. Rec. 1578 (1969). This was briefly considered in committee, but rejected in the course of consideration of the 1970 amendments to the Williams Act. By that time, the SEC no longer supported the idea of advance filings. The experience of the intervening years must have proved to the SEC that the existing regulation of tender offers was adequate to the task.[30] This legislative history shows that Congress, out of concern over the detrimental effect on the marketplace, specifically rejected on more than one occasion the notion that information about the nature and plans of one proposing a tender offer must be filed in advance of the offer with a regulatory agency.

Prior Agency Approval. In the face of claims by the Chairman of the SEC in favor of the utility of prior Commission review of tender offer disclosure statements, Congress specificially rejected a proposal that approval by a regulatory agency of tender offer disclosures be required prior to their circulation to shareholders. The interest to be served by providing an opportunity for an agency to screen for mistakes or inadequate disclosures was deemed to be outweighed by the problems created by advance filings.[31]

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[28] The usefulness of the tender offer as a device to oust inefficient management is frequently stressed in the legislative record. *See, e.g.,* 113 Cong. Rec. 854-55 (1967); *Senate Hearings* at 91, 165-73; 113 Cong. Rec. 24665 (1967).

[29] The House also rejected a bill substantially identical to the original S. 510 although the Chairman of the SEC again appeared before a Congressional Committee to urge that the requirement of advance filing with the Commission be made part of the tender offer legislation. *Takeover Bids: Hearing on H. R. 14475 and S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce,* 90th Cong. 2d Sess. 17 (1968).

[30] *Hearings on H. R. 4285, S. 3431 and S. 336 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce,* 91st Cong., 2d Sess. 21 (1970). Again in 1976, in the context of hearings with respect to possible conflicts of interest and bank financing of tender offers, SEC Commissioner Loomis was questioned about the advisability of a 60 or 120-day waiting period between the time of announcement and completion of the tender offer. He discussed the history of the 5-day waiting period at the time the Williams Act was enacted in 1968, and said that the person making the offer would most likely be unwilling to specify his price 60 days in advance since the market for the target stock might go up or down during this period. *Corporate Takeovers: Hearings on Regulation under Federal Banking and Securities Laws of Persons Involved in Corporate Takeover Before the Senate Comm. on Banking, Housing and Urban Affairs,* 94th Cong., 2d Sess. 113 (1976).

[31] *See* S. Rep. No. 550, 90th Cong., 1st Sess. 4 (1976); *Senate Hearings* at 72-75; 87-89, 98, 105, 139-140, 151, 163, 245. *See also,* Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock,* 22 BUS. LAW. 149, 152-53 (1966).

Disclosure Requirements. Legislative history demonstrates that the disclosures required by the Williams Act were, by intent, "really very simple" and limited to "just the sort of disclosures that would be most meaningful and important to the shareholders" and "shall not constitute any great burden." *Senate Hearings* at 205 (Testimony of SEC Chairman Cohen). Within this framework, the Williams Act only requires disclosure of that information Congress and the SEC thought necessary, adequate and relevant. Schedule 13D does not require detailed financial and background information about the offeror as would a registration statement filed under the 1933 Act.

A federal court has recently commented on the biased effect a requirement of a full 1933 Act registration statement would have on tender offers. In *Interstate Brands Corp. v. DPF, Inc.*, 75 Civ. 417-W-4 (W.D. Mo. June 23, 1975), the target corporation argued that financial information concerning the offeror should have been disclosed. In rejecting the argument, the court pointed out that requiring full financial information from the offeror would be inconsistent with Congress' intention "to avoid tipping the balance of regulation either in favor of management or in favor of the person making the take-over bid." The Court stated:

> It is apparent that there is an abundance of information concerning the offeror corporation's "qualifications" which might be of some secondary concern to the shareholders faced with a tender offer. Neither the Williams Act nor the regulations of the Securities and Exchange Commission require that information to be disclosed in a tender offer. To require in this case by the issuance of an injunction, that the Defendant make disclosure of the mentioned information would provide management with a tool of temporarily or permanently

> blocking any tender offer which did not give a complete history of the offeror corporation, as it is obvious that an imaginative management wishing to block an offer could determine some aspect that the offeror's "qualifications" which might be of some secondary concern to a shareholder. Such a result could not, in the opinion of the Court, be in accordance with the intent of Congress, and would decidedly tip the balance of regulation in favor of management.

Id. at 16.

Target Company Regulations. The Williams Act provides that the SEC may prescribe rules to regulate any solicitation or recommendation to shareholders by target management, and, by Regulation 14d-4, 17 C.F.R. § 240.14(d)-4, has required that Schedule 14D with certain disclosures be filed prior to target management recommendations.

Finally, the Williams Act provides for no exemption from regulation if a tender offer is recommended by target company management.

The opinion of the Fifth Circuit examines much of this legislative history of the Williams Act (J.S. App., A-38 to A-40), and also describes congressional reaffirmance of the "market approach" to investor protection under the Williams Act, the importance of legal neutrality between the competing parties and the view that regulatory provisions producing more than minimal delay could upset that neutrality, as expressed by Congress in its consideration of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18(a). (J.S. App., A. 41 to A. 42).

3.

The Idaho Act Destroys the Careful Balance Struck by the Williams Act

The Idaho Act conflicts with and upsets the neutral balance carefully struck by Congress. This conflict is particularly intolerable because the Idaho Act erects several barriers to tender offers that Congress expressly rejected when it enacted the Williams Act.

In conflict with the balanced federal regulatory scheme, the Idaho Act is biased against the tender offeror in favor of target management. The Idaho Act calls for pre-effective publication, disclosure and filing of the proposed offer, prior governmental clearance by Idaho, an extensive pre-effective hearing procedure which the Director or the target company may invoke no matter how trivial the grounds may be, extensive disclosure of information about the offeror that is of marginal relevance to an investor's decision to take cash for some or all of his stock, and less stringent regulation of, and even an exemption for offers recommended by, target management.

Idaho has attempted to regulate cash tender offers by adopting specific forms of regulation previously rejected by Congress. Where Congress expressly rejects a specific form of regulation, such rejection is as sufficient to preempt a state statute that adopts the course rejected as is affirmative enactment of federal legislation that conflicts with the state legislation. In *New York Central R. R. Co. v. Winfield*, 244 U.S. 147 (1917), for example, this Court held that a state workmen's compensation statute permitting strict liability recovery for injury had been preempted by the Federal Employer's Liability Act which provided for liability for negligence only. The federal statute did not, in terms, prohibit a strict liability approach. Nevertheless, this Court found the state statute preempted because it found that Congress had considered, and had rejected, a strict liability approach.

In *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), Congress, through the adoption of the Fair Packaging and Labeling Act, 15 U.S.C. § 1451 ("FPLA") determined to regulate federal labeling requirements on flour packages by allowing weight variations which were due to a loss of moisture during the course of good distribution practice. The application of § 12211 of the California Business & Professions Code, also regulating weight-labeling, did not permit such variations. This Court held that although the state law was not preempted by the express terms of the FPLA, because it would be possible to comply with the state law without triggering federal enforcement action, nevertheless, under *Hines v. Davidowitz*, 312 U.S. 52 (1940), the enforcement of the state law prevented the accomplishment of the objectives of Congress to allow such variations, and the state law was preempted.

The Fifth Circuit in this case properly analyzed *Jones* as holding that although no preemption was established where compliance with state law would not automatically trigger federal enforcement action, nevertheless, preemption was found under the *Hines* test because the state law interfered with the federal regulatory scheme.[32]

[32] It is respectfully submitted that Appellants have misread *Jones* and the analysis of it by the Fifth Circuit. At page 77 of their Brief, Appellants state:

> Moreover, as the circuit court pointed out, state law was preempted by *Jones* only because "compliance with state law would automatically trigger federal enforcement action. . . ."

Appellants then argue that there is no federal enforcement triggered by compliance with the Idaho Act and, therefore, no preemption. The Fifth Circuit did not point out, as claimed by Appellants, that state law was preempted in *Jones* only because of the automatic triggering of a federal enforcement action, but correctly pointed out just the reverse, and that preemption was then found under the *Hines* standard. 577 F.2d at 1275, n. 39.

In *Hines v. Davidowitz, supra,* this Court applied the doctrine of preemption to a "conflict" between federal and state statutes that parallels in many respects the conflict between the Williams Act and the Idaho Act. The federal statute was the Alien Registration Act of 1940, the requirements of which were much less stringent than a state alien registration act. This Court found that Congress had consciously decided not to take the stringent measures contained in the state statute, but to "steer a middle path." *Hines* at 73. Even though the federal scheme could have been more stringent, it was "complete" thus precluding the state from adding to it. This Court stated:

> And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement the federal law, *or enforce additional or auxiliary regulations.*

312 U.S. 66 (Emphasis supplied). Finding that the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," this Court struck down the state statute.

The provisions in the Idaho Act for advance notice and the ability they give target company management to delay the commencement of an offer by the mechanics of agency approval and the pre-effective hearing procedure confer overwhelming practical advantages on an unfriendly incumbent management. Most commentators agree that the single most effective weapon available to a target company resisting a

tender offer is time.[33] With the delay occasioned by the operation of the state law, the target company management under the Idaho Act, and similar state takeover laws, may (a) repurchase its own securities, (b) induce friendly third parties to make open market purchases of the target company securities, (c) announce dividend increases or stock splits, (d) issue additional shares of stock, (e) introduce possible antitrust considerations, (f) arrange a defensive merger, (g) enter into restrictive loan agreements, or (h) reincorporate in or transfer assets to a state, like Idaho, having a restrictive takeover law for the protection of existing management.[34]

Incumbent management of the target company can use the delay to further their own self-interest. Mr. Bartell was aware that it is not infrequently the case in negotiations between the target company and the offeror that the incumbent management wants job security or other emoluments in order to "buy" their recommendation of the offer, which, if given, deprives the state administrative agency of any jurisdiction over the offer.[35]

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[33] *See,* E. ARANOW AND H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL, 223 (1973); AUSTIN AND FISHMAN, CORPORATION IN CONFLICT: THE TENDER OFFER, 127 (1970); Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency,* 62 CORNELL L. REV. at 238 (1977); Wilner and Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality,* 45 FORDHAM L. REV. 1, 9 (1976).

[34] See, E. ARANOW AND H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL at 235, 242-268 (1973); E. ARANOW, H. EINHORN AND G. BERLSTEIN, *supra,* at 196-97.

[35] If investor protection were the primary concern of the Idaho Act, it should apply to all tender offers, not just to those which are contested. Indeed, target shareholders may need the assurance that full and fair disclosure has been made in the environment of the "friendly" tender offer. *Accord,* E. ARANOW, H. EINHORN AND G. BERLSTEIN, *supra,* at 224-27.

Appellants would continue to urge that the time periods of the Williams Act do not provide an adequate period of time during which target company management can honestly evaluate a tender offer and advise their shareholders. Appellants' Brief at 69. Mr. Wheat testified that whether the delay period be pre-offer or post-commencement, a sufficient delay period would be 30 days. When Mr. Wheat gave that testimony, on May 24, 1977, GWU's proposed interstate cash tender offer had already been delayed by the Idaho Director for approximately two months. (A. 277 to A. 278).

The record further shows that built-in delay procedures of state takeover statutes may not be in the best interests of shareholders. The mere potential for delay may inhibit an interstate cash tender offer from ever being made. Mr. Bartell testified that the presence of state takeover statutes still has a significant deterrent effect. (A. 207). Mr. Wheat candidly testified that the state statutes, as they presently appear, do, in fact, have a tendency to deter some tender offers. (A. 274). The financial loss to shareholders who were never given the opportunity to tender their shares for cash at a premium is incalculable.

Moreover, delay provided by state takeover statutes does not necessarily guarantee an increase in price.[36] Mr. Bartell testified that the offeror has raised the price in instances in which no state takeover statute applied and, further, that the delay brought about by takeover statutes is not necessarily related to any increase in the price of shares. One of

[36] In this case delay and the attendant cost worked to the disadvantage of Sunshine's shareholders. GWU's initial offer on a "friendly" basis was $16.75 per share, which was not accepted by Sunshine management. *Supra*, note 8. The proposed $15.75 per share offer was reduced to $14.75 per share on August 11, 1977. Wall St. J. (Eastern ed.), August 11, 1977, at 10, col. 1. The settlement was for $15.00 per share. *Supra*, note 1.

the strategies employed by a tender offeror when the proposed offer is regulated by a state takeover statute could very well be to make a lower opening bid than it otherwise would in anticipation that the price would have to go up in order to achieve a successful tender offer. (A. 228). Therefore, any increase in benefits to shareholders as a result of delay imposed by a state takeover statute may be illusory and occasioned only by the pricing strategy of the tender offeror.

Delay imposed by a state takeover statute may actually harm target company shareholders. According to Mr. Guest, the longer a tender offer is delayed, the more expensive it becomes for the tender offeror and the target company to pursue the effort, and the tender offeror may finally come to the conclusion to abandon the effort and seek another opportunity. (A. 148 to A. 149). (*E.g.*, Congoleum Corporation's proposed offer for Universal Leaf Tobacco Company was withdrawn after 8 months of delay and no decision under the Virginia statute. Richmond Times Dispatch, June 10, 1977).

The Idaho Act upsets the balance established by the Williams Act in other respects as well. The disclosures required by the registration statement filed pursuant to § 30-1503 go far beyond the disclosures which Congress and the SEC deemed necessary and relevant for shareholders to make an informed decision as to whether to take cash for all or some of their stock. Detailed financial and background information about the tender offeror, for example, may only tend to create a fertile ground for litigation and to obscure the really material information needed by a shareholder to make his investment decision, serving no useful purpose but additional delay and obstruction.

As stated by the authors in E. ARANOW, H. EINHORN and G. BERLSTEIN, *supra*, at 219-20:

> The disclosures required in most tender offer statutes are much more extensive than those required by the Williams Act. Nevertheless, they probably are of little benefit to the shareholders, for the information required to be disclosed may not be significant to them, and may obscure the relevant disclosures. However, the disclosure statutes do provide vastly increased opportunities for target managements to find fault with the disclosures made by tender offerors and to obtain injunctions against those offers. Full compliance with the federal disclosure requirements is at times difficult enough, even for those tender offerors who make good faith efforts to anticipate and disclose all the information that the courts might find material. Compliance with the state statutes is even more difficult. Regardless of the ultimate success of a target's objections to the accuracy and sufficiency of disclosure by an offeror, the statutes provide numerous opportunities for the target to challenge and thereby delay the offer.

Mr. Wheat concurred, testifying that state takeover statutes have gone too far in requiring a massive amount of disclosure comparable to Form S-1 which he did not think was desirable or necessary. (A. 277).

The congressional balance is further upset by the manner in which the Idaho Act regulates the target management as opposed to the tender offeror. Under § 30-1504, the target management, unlike the tender offeror, need not make any advance filing of its solicitation materials with the Director or the tender offeror, and is not required to meet any specific statutory disclosure standards. The target company's solicitation materials are only subject to the restriction that they not contain any false statement of a material fact or omit to state a material fact necessary to make the statement

therein not misleading. The Idaho Act gives to the target management the power to exclude the offer from state regulation by recommending its acceptance, § 30-1501(5)(e), in which event the offeror's information does not even have to be disclosed to the target company's shareholders. This stands in stark contrast to the regulation of the tender offeror and target management in *all* tender offers governed by federal law and to the restrictions imposed on target management by federal law.[37]

Finally, the Idaho Act operates in other respects to frustrate the means chosen by Congress for shareholder protection. For example, the advance newspaper announcement required by § 30-1503 not only conflicts with the basic administration and regulation of cash tender offers under the Williams Act, but may discriminate against target company shareholders around the country who do not subscribe to the newspaper in which the publication is placed. Moreover, under § 14(d) of the 1934 Act, a tender offer commences when it is first published, sent or given to security holders. At that point, the time periods begin to run for the withdrawal of tendered shares and the proration of shares tendered early in a partial offer. Under the Idaho Act, these time periods begin to run only when the offer is declared effective by the Director. § 30-1506(2) and (3). The pre-commencement publication in Idaho may, therefore, start the tolling of substantive federal rights of withdrawal and proration. Pre-effective publication, advance notice and hearings may cause premature activity in the national marketplace, whereby open market purchases of target company

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[37] *See, e.g.*, Rule 13e-1, 17 C.F.R. § 240.13e-1 (1977), limiting the ability of a target corporation to repurchase its own shares during a tender offer, and Rule 14d-4, 17 C.F.R. § 240.14d-4 (1977) imposing disclosure requirements on incumbent managers who wish to recommend that shareholders accept or reject a tender offer.

stock by arbitrageurs and others may drive the price up toward the proposed tender offer price and reduce target company shareholder incentive to tender their shares. *See, generally*, E. ARANOW and H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL at 173-91 (1973).

E. ARANOW, H. EINHORN AND G. BERLSTEIN, *supra*, at 227-29 have concluded:

> The Williams Act was deliberately designed to avoid favoring either the tender offeror or the management of the target. Congress specifically considered and rejected pre-effective filing and clearance of tender offer materials because of the impact of such procedures upon the market and upon tender offers. Furthermore, the Supreme Court has ruled that tender offers may be enjoined only upon a showing of irreparable harm.
>
> In contrast, the state pre-effective filing and clearance requirements give substantial advantages to the target's management if it wishes to defeat an announced tender offer. These requirements permit the tender offer to be delayed without a showing of irreparable harm, or even of violation of the state statutes. Consequently, they give the management the opportunity to persuade shareholders to reject the tender offer before the offeror has had the opportunity to solicit their shares. . . . In addition to the conflicts previously discussed, the state statutes, because of their purported extraterritorial applicability, present to the tender offeror a mass of conflicting requirements, making compliance difficult, if not impossible, even for the best-intentioned offeror. The suggested use of conflict of law principles can do little to lessen the difficulties of noncompliance. The application of conflicts rules is uncertain, and does not eliminate the possibility that conflicting determinations will be reached by courts of different states. In any event, judicial resolution of such issues raised by each tender offer cannot be accomplished without a substantial delay.
>
> For these reasons, the authors believe that, logically, state tender offer statutes are and should be preempted by federal legislation. It appears that the harm caused by the state statutes' disruption of the securities market, and of the orderly regulation of tender offers, far outweighs the benefits to be derived from state tender offer statutes.[38]

As discussed by the Fifth Circuit, the congressional approach to the regulation of cash tender offers was a market approach under which investors would make their own decisions while tender offeror and target management were regulated evenhandedly. The Idaho approach was a fiduciary one, under which the scales were tipped in favor of target management in reliance upon their fiduciary responsibilities to investors. The destruction of the neutral balance struck by Congress causes the Idaho Act to stand as an obstacle

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[38] In *Dart Industries, Inc. v. Conrad*, IP78-709-C (S.D.Ind. Nov. 17, 1978), the District Court held that the Delaware Tender Offer Act, Del. Code Ann. tit. 8, § 203, *et seq.*, was preempted by the Supremacy Clause and unconstitutional under the Commerce Clause. In an earlier stage of that litigation, the court found the Indiana Business Takeover Act, Ind. Code §§ 23-2-3-1, *et seq.*, to be null and void on preemption and constitutional grounds. *Dart Industries, Inc., v. Conrad*, IP78-709-C (S.D.Ind. Nov. 10, 1978).

In *Daylin, Inc. v. Uarco, Inc.*, 78 C 4246 (N.D.Ill. Nov. 27, 1978), the Illinois Business Take-Over Act was enjoined on constitutional grounds. To the same effect was the injunction order in *Mite Corporation v. Dixon*, 79 C 200 (N.D.Ill. Feb. 2, 1979).

In the Occidental Petroleum Corporation offer for Mead Corporation, the Federal District Court of the Southern District of Ohio expressed grave doubt as to the constitutionality of the Ohio takeover statute, Ohio Rev. Code Ann. § 1707.041, Case C-2-78-1100, unpublished opinion, November 7, 1978.

The constitutionality and enforceability of the Massachusetts Takeover Act, Mass. Gen. Laws Ann. ch. 110C, § 1, *et seq.*, is under challenge in *Tyco Laboratories, Inc. v. Connelly*, CA 79-265 T (D.Mass., Feb. 9, 1979).

to the accomplishment and execution of the full purposes and objectives of the Williams Act. 577 F.2d at 1279-80.[39]

4.

The Pervasive Federal Regulation of Interstate Cash Tender Offers Preempts the Idaho Act

Federal law preempts a state statute whenever a scheme of regulation, created by federal legislation and implemented by a federal administrative agency charged with responsibility for enforcing the regulatory scheme, is so pervasive that no room has been left for state law to provide supplemental regulation. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

The addition of the Williams Act amendments to the 1934 Act and the delegation to the SEC of authority to promulgate rules and regulations created a comprehensive legislative scheme for the regulation of virtually every aspect of transactions in outstanding securities, including purchases and sales pursuant to cash tender offers. Pursuant to its dele-

[39] Senator Williams has written "[a]dvance notice provisions, and requirements concerning the duration of offers, the prorata purchases of shares, and the withdrawal rights of shareholders either explicitly conflict with federal provisions on the same subjects or are obstacles to the accomplishment of objectives implicit in the federal statutes." H. WILLIAMS, INTRODUCTION TO DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL xix (1977).

gated authority, the SEC promptly promulgated rules and regulations for the implementation of the Williams Act.[40]

The 1934 Act, including the Williams Act amendments, the rules and regulations promulgated by the SEC pursuant to its rule-making powers, and the myriad federal court cases construing the Williams Act constitute an extensive system of federal regulation of interstate cash tender offers. Inconsistent state action cannot be permitted to impede or frustrate the congressional design for the regulation of such offers. In view of a clear congressional intent to occupy this field of regulation, any state law which interferes with or precludes the operation of the federal regulatory scheme necessarily conflicts with the provisions of the 1934 Act and is, therefore, invalid.

This conclusion is supported by decisions concerned with other federal regulatory schemes which have been held to preclude state interference. In *City of Burbank v. Lockheed Air Terminal, Inc., supra*, a municipal airport curfew imposed to reduce local noise was preempted and, therefore, invalidated by a "comprehensive scheme of federal control" of airport noise involving the Federal Aviation Administraton and the Environmental Protection Agency. In *Burbank*, the fed-

[40] *E.g.*, 17 C.F.R. § 240.13d-1 (1968), describing the information to be furnished to the SEC by a tender offeror; 17 C.F.R. § 240.14d-1(a) (1968), describing the information to be furnished to target company shareholders by the tender offeror; 17 C.F.R. § 240.14d-4 (1968), describing information to be filed with the SEC by a target company tendering for its own shares or attempting to persuade its shareholders to either accept or reject the tender offer. On February 5, 1979, the SEC published for comment Proposed Rules and Schedule for regulating conduct relating to tender offers for the protection of investors. SEC Release Nos. 33-6022; 34-15548; IC-10575; File No. S7-770 (17 C.F.R. Part 240). These proposed regulations state, at page 2, that they are a part of the SEC's on-going program to replace its emergency rules under the Williams Act with a comprehensive regulatory framework with respect to tender offers.

eral statute did not by its terms preclude local enforcement of municipal ordinances against local airport noises. Nevertheless, this Court found that the "pervasive nature of the scheme of federal regulation of airport noise" compelled the conclusion that state or local actions were preempted. 411 U.S. at 633. This Court stated, quoting *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944),

> Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway, it is caught up in an elaborate and detailed system of controls.

411 U.S. at 633-34.

Federal control over the regulation of the securities markets, including the purchase and sale of securities in the context of cash tender offers, is no less "intensive," "elaborate" and "detailed" than federal control over aviation.

Where the federal government has reached a balance which satisfies the "needs of the subject matter without disproportionate burden on the regulatees, the balance struck is not to be upset by the imposition of higher local standards." *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 171 (1963) (White, J. Dissenting). Thus, the Supremacy Clause forbade efforts by a state to afford patent protection to that which Congress had deemed unworthy of protection because the state efforts "disturbed the careful balance" which Congress had drawn. *Goldstein v. California*, 412 U.S. 546, 569-70 (1973).

The Williams Act is not merely a disclosure statute, but,

> . . . goes considerably beyond disclosure . . . and requires certain substantive changes in cash tender offer policy. In a sense, these provisions . . . constitute a code of "fair play" in cash tender offers. . . .

Hamilton, *Some Reflections on Cash Tender Offer Legislation*, 15 N.Y.L.F. 269, 274-75 (1969). These substantive provisions provide the offeror and incumbent management of the target company with equal opportunity to present their cases to the shareholders, who will then be able to make a fully informed choice. *Bath Industries, Inc. v. Blot*, 427 F.2d 97 (7th Cir. 1970); *Boyertown Burial Casket Co. v. Amedco, Inc.*, 407 F.Supp. 811 (E.D.Pa. 1976).

The pervasiveness of the federal regulatory scheme over the national securities marketplace, including the regulation of transactions occurring as a result of interstate cash tender offers for securities already traded in the national securities markets, is the result of the necessarily balanced nature of its regulation rather than any sheer bulk of specific regulations. This Court has declared that "just as a state cannot encroach upon the federal . . . law directly, it cannot give protection of a kind that clashes with the objectives of the federal law." *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964).[41]

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[41] Several commentators have concluded that the 1934 Act represents a sufficiently "pervasive" scheme of federal regulations so as to preempt state jurisdiction in the area, including preemption of state take-over acts. *See, e.g.*, Wilner and Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. at 30 (1976); Note, *Commerce Clause Limitations on State Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133, 1164 (1974). Wilner and Landy conclude that although the Williams Act may not, on its face, truly be a "pervasive" scheme to regulate tender offers "since it merely mandates the timing and content of disclosure," because it has been "integrated by Congress into the Securities Exchange Act of 1934, which, in effect, controls every other facet of tender offers," "[t]aken as a whole, that Act is certainly comprehensive."

5.

The Dominant Federal Interest in the Regulation of Interstate Cash Tender Offers Preempts the Idaho Act

Whenever federal law regulates a field in which the federal interest is clearly dominant, the federal system necessarily precludes enforcement of state laws on the same subject. *Rice v. Santa Fe Elevator Corp., supra; Hines v. Davidowitz, supra.* As this Court stated in *Cooley v. Board of Wardens*, 53 U.S. 229, 319 (12 How. 299) (1851):

> Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; *some imperatively demanding a single uniform rule. . . .*
>
> Whatever subjects of this power are in their nature national, or *admit only of one uniform system, or plan of regulation*, may justly be said to be of such a nature as to require exclusive legislation by Congress. (Emphasis supplied).

This Court recently overturned municipal regulation of air travel on the ground that the area "requires a uniform system of federal regulation if the congressional objectives underlying the Federal Aviation Agency Act are to be fulfilled." *City of Burbank v. Lockheed Air Terminal, Inc., supra*, at 639. Similarly, control of interstate tender offers requires a uniform system of national regulation because non-uniform, arbitary protection of incumbent management precludes effective functioning of the national securities markets. *Hearings on Corporate Takeovers Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 101 (1976) (Statement by Richard A. Debs, Federal Reserve Bank, New York). "[T]ender offers are frequently a matter of national concern and the issues they present call

for resolution on a national scale." *Id.* at 91 (Comment of SEC Commissioner Philip Loomis).

Mr. Bartell discussed the proliferation of state takeover statutes (A. 195), and the resulting increase in the potential that a particular tender offer could be subject to more than one such statute. (A. 208). As a result, tender offerors do have to deal with the prospect of a hearing in more than one state and the potential for varying degrees of jurisdiction in more than one state. (A. 210).

The need for a uniform system of regulation under the federal regulatory scheme is exemplified by the situation which actually occurred in this case when state officials of Idaho, New York and Maryland threatened, considered or actually asserted jurisdiction over GWU's proposed interstate cash tender offer. Mr. Wheat himself eloquently made GWU's argument that the state statutes have destroyed uniformity of the regulation of interstate tender offers.

> I believe that it is true that the State statutes, as they presently appear, do in fact have a tendency to deter some tender offers. And part of the reason for that is the — the differences, the kind of mixture of differences in the state statutes and I would therefore applaud the efforts of Mr. Bartell and other State Commissioners to achieve uniformity as a very desirable objective among the state statutes. Such efforts are in progress.

(A. 274).

The lack of uniformity among state schemes of regulation was perceived by Mr. Bartell to create problems relating to the definition of the target company, the specificity of the terms that are used to define the target company, the mandatory hearing requirement, the time limitations that are used and the substantive rights that are provided to tendering shareholders for proration and withdrawal rights. (A. 210

to A. 211). Mr. Bartell was concerned that the time periods which vary between the states are inconsistent so that if a number of states should assert jurisdiction with respect to a particular transaction, the offeror would have a difficult time knowing what to expect as far as a decision is concerned or arranging financing or making other plans in connection with the offer. (A. 201).

In the final analysis, the state having the longest waiting period or allowing the most protracted hearing and review procedures will determine when and whether an interstate cash tender offer is made, irrespective of compliance with the carefully balanced federal regulatory scheme as well as compliance with the statutes of other states asserting extraterritorial jurisdiction. The absolute inability of the Idaho Legislature to effectively regulate tender offers without having a nationwide impact through the extraterritorial application of the Idaho Act further demonstrates the necessity for a single, uniform federal scheme of regulation.[42]

VIII.

THE IDAHO ACT IMPERMISSIBLY BURDENS INTERSTATE COMMERCE

The Idaho Act is unconstitutional under well-established principles based on the Commerce Clause of the United States Constitution. States are prohibited from enacting

[42] In its Release Nos. 33-6022; 34-15548; IC-10575; File No. S7-770 (17 C.F.R. Part 240), the SEC notes that the proliferation of state "anti-takeover statutes" since 1968 "has resulted in an inconsistent, overlapping and often counter productive pattern of regulation and in many instances may have tipped the carefully construed balance between bidder and subject company envisioned by the Williams Act in favor of the subject company. Accordingly, the Commission believes that a uniformly applied federal regulation would better serve the purposes and policies of the Williams Act, including Interests of investors."

legislation which unduly burdens interstate commerce. The proper test to determine the validity of a state statute affecting interstate commerce was outlined by this Court in *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Portland Cement Co. v. Detroit*, 363 U.S. 440, 443 . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Accord: Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978); *A & P Tea Co. v. Cottrell*, 424 U.S. 366, 370-71 (1976).

1.

The Idaho Act Does Not Effectuate a Legitimate Local Public Interest

Whether a state statute achieves a legitimate local public interest will be determined by its substantive and practical effects, rather than a declaration of purpose by the legislature or the motive which compelled its enactment. *Foster-Fountain Packing Company v. Haydel*, 278 U.S. 1, 10 (1928); *Lacoste v. Department of Conservation*, 263 U.S. 545, 553 (1924).

> One challenging the validity of a state enactment on the ground that it is repugnant to the Commerce

> Clause is not necessarily bound by the legislative declarations of purpose. It is open to him to show that in their practical operation its provisions directly burden or destroy interstate commerce.

Foster-Fountain, 278 U.S. at 10.

> This Court will determine for itself what is the necessary operation and effect of a state law challenged on the ground that it interferes with or burdens interstate commerce. The name, description or characterization given it by the legislature or the courts of the state will not necessarily control. Regard must be had to the substance of the measure rather than its form.

Lacoste, 263 U.S. at 550.

As this Court has frequently observed, the Commerce Clause is more than a grant of congressional power. The Clause also provides constitutional sponsorship for the creation and maintenance of interstate markets, where goods and services can move freely and quickly, unimpeded by state borders or other restraints which are imposed by, and not for the sake of, parochial state and local interests. In short, the Commerce Clause, by its own force "create[d] an area of free trade among the several States." *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944) — in effect, a federal "common market." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976).

The "common market" concept and the areas of "free trade" promoted by the Commerce Clause, must, of course, be "free from interference by the States," *Freeman v. Hewitt*, 329 U.S. 249, 252 (1946). Interstate markets for securities are within the area of "free trade" created by the Commerce Clause. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977). To this end, the Commerce Clause

erects a constitutional presumption against state regulation of "phases of . . . commerce" that are in their nature intensely "national," *Southern Pacific R. R. Co. v. Arizona*, 325 U.S. 761 (1945), at least where that regulation impedes the "free flow of commerce from state to state". *Id.* at 767. A state's regulation is also of doubtful validity under the Commerce Clause where it necessarily extends far beyond that state's boundaries, since

> To the extent that the burden of state regulation falls on interests outside the state it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.

Id. at 767-68 n. 2.

Despite the admonition that no state may "place itself in a position of economic isolation," *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 527 (1935), the Idaho Act erects economic barriers around local target corporations. The true purpose of the Idaho Act is to promote economic protectionism rather than to benefit target company shareholders residing in Idaho. This is evident from the provision of the Idaho Act which exempts from its provisions any offer which is recommended to the stockholders by target company management. § 30-1501(5)(e). Moreover, despite Appellants' urging that shareholder protection is the primary purpose of the Idaho Act, its provisions apply regardless of the absence or presence of any Idaho shareholder. Consequently, Appellants could be in the position of judging whether or not a tender offer could proceed when no stockholder is a resident of the State of Idaho. In fact, that is almost the situation here where nearly 98% of the shareholders of Sunshine resided outside the borders of Idaho. Further, Idaho has little reason to protect shareholders of other states, if

their securities transactions do not take place within Idaho or substantially affect Idaho shareholders.[43]

Mr. Bartell, emphasizing the fact that state takeover acts are really designed to protect local industry and incumbent management, testified that most of such state legislation originated not with the state securities administrators, but "with firms that believe the legislation will be advantageous to them." Mr. Bartell cited the Ohio takeover statute as an example. (A. 197).[44]

The pro-management features of the Idaho Act may actually injure the interests of locally resident shareholders of the target company by delaying, and perhaps eventually defeating, a tender offer for cash at a premium over the existing market price. Sunshine shareholders lost money because of the delays following the Idaho letter and the Order effectively enjoining GWU's proposed interstate cash tender offer.[45] The primary interest of local investors is to sell shares

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[43] *See* Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. at 17 (1976); Note, *Commerce Clause Limitations on State Regulation of Tender Offers*, 47 S. CAL. L. REV. at 1153 (1974). *See also, Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917), upholding the constitutionality of state Blue Sky laws against a Commerce Clause attack on the basis that they operated only within the state. The American Law Institute, *Federal Securities Code* (Proposed Official Draft, March 15, 1978) § 1904(c) would preempt state regulation of tender offers, unless the target company has its principal place of business in that state and more than 50% of the target company shareholders holding more than 50% of its securities reside in such state.

[44] *See*, Moylan, *State Regulation of Tender Offers*, 58 MARQ. L. REV. 687, 690 (1975) characterizing the Ohio statute as "one of the most glaring examples of special interest legislation." *See also*, Sommer, Jr., *The Ohio Take-Over Act: What Is It?* 21 CASE W. RES. L. REV. 681, 682-83 (1970). It has been nationally reported that the Idaho Act was largely "the brainchild of Morrison-Knudsen Co.," a large Boise-based construction concern. Wall St. J., November 19, 1975, p. 26, col. 2.

[45] *See* note 36, *supra*.

of the target company at the tender price in reliance upon the protection of the federal regulatory scheme. Mr. Wheat testified that a shareholder is principally interested in the price he will receive above the current market price. (A. 268). Federal courts have been mindful of the congressional purpose to protect the rights of *shareholders*:

> While courts should rigorously enforce the policy of honesty and fair dealing prescribed by federal securities legislation, they must guard against the risk that, at the instance of incumbent management, they may be frustrating informed stockholders from doing what the latter want.

Butler Aviation International, Inc. v. Comprehensive Designers, Inc., 425 F.2d 842, 845 (2d Cir. 1970). If any doubt remains as to the true purpose of the state takeover statutes, it is laid to rest by New York Attorney General Lefkowitz, formerly a party to this suit, who has admitted that "enactment of . . . [state takeover] legislation is usually designed to prevent corporations from moving their place of business to another state resulting in the removal of factories and plants, etc. from the state." 354 BNA. SEC. REG. L. REP. A-27 (1976).

> The practical effect and unstated purpose of the state statutes regulating tender offers is to insulate management from attack or take-over by tender offers and thereby protect the business and economic life of the state. Under the *Pike* rationale, this purpose of preserving or insuring local employment is illegal *per se* and is analogous to conferring an advantage on local producers over out-of-state competitors. Where states insulate local management through the regulation of tender offers they are conferring an advantage on local management, which is often inefficient, by protecting them from attack by their out-of-state competitors and thereby insuring them an advantage forbidden by *Pike*.

Note, *Commerce Clause Limitations on State Regulation of Tender Offers*, 47 S. CAL. L. REV. at 1159 (1974). The Idaho Act insulates local target companies by requiring advance notice and providing the means to delay offers. Incumbent management is virtually exempted from state law requirements, and may render state law inapplicable. Under the Idaho Act, the offeror is prohibited from exercising any control, directly or indirectly, over any assets of the target company unless the takeover is made in compliance with the local statute. § 30-1506(6). These tactical advantages given to incumbent management, together with a prohibition against the relocation of target company assets, clearly reflect that the Idaho Act is an attempt to regulate interstate commerce in order to protect local industry and the local economy.

> The Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal.

Pike v. Bruce Church, Inc., supra, at 145. In *Hood & Sons v. DuMond*, 336 U.S. 525 (1949), a state denied a milk distributor a license to operate an additional plant on the grounds that a proposed expansion of the distributor's facilities would reduce the supply of milk for local markets. This Court, holding that the statute violated the Commerce Clause, stated:

> [T]he measure [is not] supported by health or safety considerations, but solely by protection of local economic interests, such as supply for local consumption and a limitation of competition. This Court unanimously rejected the state's contention in the *Seelig* case and held that the Commerce Clause . . . prohibits such regulation for such ends.

Id. at 531. Mr. Bartell put his finger directly on the fatal constitutional infirmity of the Idaho Act. The takeover statutes "have the effect of, by virtue of their deterrent, a deterrence effect, having the effect to preserving the character of local industry, local companies and maintaining the employment base of the state and economic and social benefits. . . ." (A. 215).

Idaho may not deny permission to make an offer to a tender offeror who seeks a substantial investment in an existing corporation merely to prevent plant relocation. The Idaho Act protects incumbent management, assures continuation of business and jobs and discourages takeover bids which may involve relocation of corporate operations on the pretense of requiring fuller disclosure to the shareholders of target companies.

2.

The Idaho Act Burdens Interstate Commerce

The direct effect of the Idaho Act is to discourage the making and commencement of tender offers. Mr. Boswell testified that "[a]s an investment banker, as a lawyer and as a businessman, I have been involved in several tender offers, and I know that since the passage of the Takeover Statutes, there has been an effect which is to discourage tender offers." (A. 239). He also testified to the detrimental effect of delays which are inherent in the application of the Idaho Act, saying that "the delay materially decreases the likelihood of a successful tender offer in most instances." (May 24, 1977, Trial Tr., p. 190). In addition to decreasing the likelihood of the success of the tender offer, the offering

company is affected by the delay in that its funds which are committed to the offer are frozen as expenses and costs of capital rise ever higher. The Idaho-mandated advance announcement of a tender offer could result in leaks of information which would be extremely disruptive to the securities market and destructive of tender offers. *Senate Hearings* at 72. Another effect on interstate commerce is a change in pricing strategy by the offeror, resulting in "low ball" offers in anticipation of raising the price to secure target management approval and avoidance of the application of the state takeover statutes. (A. 228, Testimony of Mr. Bartell). Mr. Bartell also testified that delay tends to deter tender offers and that the state tender offer statutes still represent a significant deterrent fact. (A. 207).

In this case the Idaho letter requesting GWU to file substantial additional information and the accompanying Order delayed GWU's proposed interstate cash tender offer that otherwise could have gone forward. That action, in the words of the Fifth Circuit, "*stopped* over 31 million dollars of interstate commerce." 557 F.2d at 1284. The Idaho letter created difficulties for GWU in complying with the 1933 Act and the 1934 Act, resulting in a determination by GWU that it might not ever be able to adequately respond to Idaho. (May 23, 1977, Trial Tr., p. 156, Testimony of G. Michael Boswell).

The extraterritorial reach of the Idaho Act had an inherent impact on interstate commerce, as it was purposefully designed to change disclosures which GWU would make in other states and to delay the consummation of securities transactions in other states until the requirements of the Idaho Act were met. Through its extraterritorial application, the Idaho Act, in practical effect, attempted to legislate for the entire nation. *Cf., Southern Pacific R.R. Co. v. Arizona,*

325 U.S. 761, 773-75 (state regulation of train lengths that had the practical effect of regulating the length of out-of-state trains); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959) (state restriction on mud guards for trucks and trailers preventing the same vehicle from operating in more than one state ran afoul of the policy of free trade reflected in the Commerce Clause).

Still another effect on interstate commerce is the inconsistency among state takeover statutes. The time periods for administrative clearance are not consistent, nor are the definitions of the jurisdictional base. Advance publication as required in Idaho might have violated a New York prohibition of advance publication, according to Mr. Boswell. (A. 235). The Report of the Subcommittee on Proxy Solicitations and Tender Offers of the Federal Regulation of Securities Committee, *State Takeover Statutes and the Williams Act*, reprinted in 32 BUS. LAW. 186, 193 (1976), gives the example of a tender offer for shares involving the state takeover statutes of Ohio, Indiana and Delaware, where the hearing procedures in Ohio and Indiana could "collide" with the Delaware requirement that the offer be made not less than 20 nor more than 60 days after delivery of a statement of intent to make the offer.[46]

Conflicts among the statutes cannot be cured by the process of one administrator deferring to an administrator in another state because "in some instances I think there is a question as to whether a state administrator under his or her statute can actually defer to another state." (A. 216, A. 226, Testimony of Mr. Bartell). Undoubtedly, however, such deference is not required in any circumstance. The

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[46] E. ARANOW, H. EINHORN AND G. BERLSTEIN, *supra*, at 228, also express the concern that the state takeover statutes may be contradictory.

total lack of uniformity among the state statutes puts the potential offeror constantly at risk, no matter what his course of action may be. As Virginia's Securities Commissioner, Thomas P. Harwood, Jr., observed at the May 9, 1977, seminar of the Association of the Bar of the City of New York in connection with this very tender offer, "There is nothing that disrupts commerce more than not knowing what the rules are."

3.

The Burdens Imposed on Interstate Commerce by the Idaho Act are Clearly Excessive in Relation to the Putative Local Benefits

Even if a state statute advances a legitimate state interest, it nevertheless violates the Commerce Clause if it burdens interstate commerce excessively in relation to the local benefit. *Pike v. Bruce Church, Inc., supra; Bibb v. Navajo Freight Lines, Inc., supra; Southern Pacific R.R. Co. v. Arizona, supra.* This weighing of the national interests and the free flow of commerce against a legitimate state interest requires an analysis of the "nature and extent" of the burdens imposed on interstate commerce by the state statute. There can be no question that trading in securities involves interstate commerce. *See, Freeman v. Hewitt, supra.* Unlike traditional state Blue Sky laws, the Idaho Act is not limited to intrastate transactions. It would purport to apply even if no shareholder resided in Idaho, and even though the interstate cash tender offer was made exclusively out-of-state for the equity securities of any target company covered. For example, the Idaho Act would purport to prevent GWU from purchasing the securities of a Washington corporation owned by a shareholder in Florida because of Sunshine's contacts in Idaho. In *Baldwin v. G. A. F. Seelig, Inc., supra,* this Court held invalid a New York statute with a similar

extraterritorial reach. The statute in that case prohibited the sale of imported milk in New York unless the price paid to the producer in the state of origin was at least equal to the minimum price prescribed in New York. This Court noted that New York could not "project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." *Id.* at 521. This indirect regulation by one state of the price to be paid in another state violated the Commerce Clause:

> One state may not put pressure of that sort upon others to reform their economic standards. If farmers or manufacturers in Vermont are abandoning farms or factories, or even failing to maintain them properly the legislature of Vermont, and not that of New York, must supply the fitting remedy.

Id. at 524.

The Idaho Act attempts to control conduct outside of Idaho more than the statute in *Baldwin* because it could be used to prohibit an interstate cash tender offer in every other state, even though such other states may have an equal or greater contact with the target company, but may choose not to enact takeover legislation. Idaho, thus, seeks to impose legislative judgment upon other states and their shareholders as well as upon foreign corporations. This direct burden on interstate commerce is hardly outweighed by the minimal protection the Idaho Act gives to Idaho shareholders.

Any protection to Idaho shareholders afforded by the Idaho Act is far from certain. Any desire to make a cash tender offer for shares held by Idaho residents may be deterred by the very presence of the Idaho Act. The proposed tender offer, once announced, may be withdrawn as the tender offeror becomes discouraged with attempts to com-

ply with the Idaho Act's pre-effective filing, hearing and disclosure requirements. The announced offer may purposefully be set at a price lower than the tender offeror is really willing to pay, so that any advantage to Idaho shareholders is illusory. Because of delays experienced and costs incurred, the tender offeror may actually lower the original price. Substantial disclosure requirements may be of little use to a shareholder making an economic judgment whether to tender shares for cash at a premium. If anything, target management should be required to make additional disclosures since it is more likely to possess current information about the current value of target company shares.

Appellants argue that the Idaho Act encourages civic responsibilities by offering protection to local industry, but the same protection is afforded irresponsible target management. Idaho can encourage good corporate citizenship in other ways which have a far less substantial impact on interstate commerce, such as through tax incentives and civic programs in which local corporate leaders could participate. In short, the burdens on interstate commerce imposed by the Idaho Act are disproportionate to any legitimate benefits provided, and the Idaho Act is invalid under the Commerce Clause. *Accord*: E. ARANOW, H. EINHORN AND G. BERLSTEIN, *supra*, at 229-31.

Appellants' reliance upon *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific R.R. Co.*, 393 U.S. 129 (1968), is misplaced. In *Brotherhood*, which dealt with the constitutionality of the Arkansas "full crew" statute regulating the size of train crews in the State of Arkansas, this Court recognized that "Congress was aware of state full-crew laws and did not intend to override them." 393 U.S. at 134. However, enactment of the Williams Act preceded the recent proliferation of state takeover statutes, including the Idaho Act. The *Brotherhood* decision also recognized the issue of safety as a legitimate local concern. Idaho's regulation of an interstate commercial transaction is of an entirely different nature. This Court also concluded that an "insignificant" problem was created by requiring a train to stop at the Arkansas state line to pick up an additional crew member. Hardly the same problem is presented when an interstate commercial transaction can proceed in no state, even if no shareholders reside in Idaho, until the Idaho statute is satisfied. This Court in *Brotherhood* observed that the full-crew statutes "had no effects outside the state beyond those of picking up and setting down the extra employee at the state boundaries. . . ." 393 U.S. at 139. The record here clearly reflects the extra-territorial impact of the Idaho Act.

Appellants assert that Idaho regulatory authority resembles the conduct of proxy contests for corporate control, and the Idaho Act may be justified on the state's interests in regulating the internal corporate affairs of Sunshine. There are distinct differences between a proxy contest, in which shareholders transfer only voting power, and interstate cash tender offers, where internal corporate procedures are not involved as an outsider purchases outstanding securities. Further, Washington law governs the internal affairs of Sunshine, not Idaho law. Can it be said that in the incipient stages of GWU's plans Idaho, Maryland and New York had the right to regulate the internal affairs of a target company incorporated in Washington? Obviously, conflicts will certainly occur where several states attempt to assert jurisdiction over the internal affairs of one corporation.[47]

The Courts below correctly decided that the Idaho Act is invalid under the Commerce Clause.

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[47] See, Wilner & Landy, *The Tender Trap: State Takeover Statutes and their Constitutionality*, 45 FORDHAM L. REV. at 16-18 (1976).

IX.

GWU HAS STANDING TO CHALLENGE THE ENFORCEABILITY AND CONSTITUTIONALITY OF THE IDAHO ACT

The District Court correctly framed the standing issue in terms of "injury in fact" (a concrete interest in the outcome of the suit, sufficient to render the matter a case or controversy subject to a federal court's jurisdiction under Article III of the Constitution of the United States), and in terms of whether GWU is a proper proponent of the legal rights it seeks to enforce by being within the "zone of interests" sought to be protected. *Singleton v. Wulff*, 428 U.S. 106 (1976); *Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970).

After having made a substantial investment in the stock of Sunshine, GWU filed its Schedule 13D with the SEC and announced and was prepared to go forward with an interstate cash tender offer to purchase up to an additional 2,000,000 shares of Sunshine stock at $15.75 per share. The proposed offer was effectively enjoined anywhere in the world by the enforcement action taken by Idaho officials pursuant to the Idaho Act and GWU, for itself, brought an action for a declaration that the Idaho Act represented an unconstitutional burden on interstate commerce in violation of the Commerce Clause, intruded unwarrantedly into a field preempted by federal regulation, contravened the Supremacy Clause, and denied to GWU other rights, privileges and immunities under the Constitution. GWU also sought for itself an injunction to redress these wrongs by restraining the operation and enforcement of the Idaho Act. GWU clearly demonstrated that the challenged action of the Idaho defendants had caused it economic injury in fact, as it was GWU's tender offer which was significantly jeopardized and

GWU's capital which was frozen by reason of the enforcement of the allegedly unenforceable and unconstitutional state law. GWU clearly invoked the District Court's jurisdiction by showing that it had suffered "some threatened or actual injury resulting from the putatively illegal action. . . ." *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (citations omitted).

GWU did not assert a "generalized grievance" and did not rest its claim for relief on the legal rights or interests of third parties. *Id.* at 499. The litigation was not of a "hypothetical or abstract character," *Flast v. Cohen*, 392 U.S. 83, 100 (1968). GWU alleged that it had sustained or was in immediate danger of sustaining some direct injury "as the result of [the statute's] enforcement. . . ." *Cramp v. Board of Public Instruction*, 568 U.S. 278, 283 (1961).

Having complied in all respects with the requirements of federal law, GWU was uniquely within the "zone of interests" intended to be protected because the challenged state law is preempted and imposes an impermissible burden on interstate commerce. Inasmuch as the Idaho Legislature, through the enactment of a state takeover statute having a nationwide impact, acted in disregard of the command of federal law which regulates cash tender offers nationwide, GWU was certainly within the class of persons that the federal law was designed to protect. *Data Processing Service Organizations v. Camp*, *supra*, at 155.

As the District Court held, this Court's decision in *Piper v. Chris-Craft Industries, Inc.*, *supra*, does not compel a contrary result. GWU was not asserting the existence of any implied cause of action under the Williams Act. GWU was not seeking damages against the target company or anyone

else. To the extent that *Piper* could have any relevance at all to the issue of standing to assert the unconstitutionality and unenforceability of a state takeover statute, this Court specifically withheld judgment on the standing of a tender offeror to sue for relief other than damages. *Piper* at 42. And the congressional policy of evenhandedness in the regulation of tender offeror and target management under the Williams Act is probative of its intent to grant standing to tender offerors and target management for declaratory and injunctive relief under the Williams Act.

Finally, GWU did not assert any action under § 10(b) of the 1934 Act or Rule 10b-5 promulgated thereunder, and this Court's decision in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), relied upon by Appellants, is inapposite.

X.

WAYNE L. KIDWELL (NOW DAVID H. LEROY) SHOULD BE DISMISSED AS A PARTY APPELLANT

Wayne L. Kidwell, Attorney General of Idaho, was a party to the proceedings before the District Court, but did not choose to appeal from the judgment of the District Court. The only Appellant in this case before the Fifth Circuit was Tom D. McEldowney, Director of the Idaho Department of Finance. Since Wayne L. Kidwell (now David H. Leroy) was not a party to the proceeding in the court from whose judgment this appeal is sought, he is not a proper party to any proceeding before this Court. U. S. Supreme Court Rule 10. GWU timely filed a motion to dismiss the Idaho Attorney General as a party Appellant pursuant to that Rule.

CONCLUSION

The judgments below by both the District Court and the Fifth Circuit should be affirmed for the reasons stated herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Twenty-five (25) copies, as requested, of the foregoing Brief of Appellee were mailed, first-class air mail, postage prepaid, on this the 27th day of March, 1979, to the following counsel of record for the Appellants:

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

Supreme Court, U. S.
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No. 78-759

DAVID H. LEROY, Attorney General of Idaho,
and TOM D. MCELDOWNEY,
Director of the Department of Finance
of the State of Idaho,
Appellants,

VS.

GREAT WESTERN UNITED CORPORATION,
Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

APPELLANTS' REPLY BRIEF

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On Appeal from the United States Court of Appeals for the Fifth Circuit

APPELLANTS' REPLY BRIEF

ARGUMENT

I

THE FICTION OF EX PARTE YOUNG MUST BE RECOGNIZED AS MERELY A FICTION, AND NOT EXPANDED TO ACCOMPLISH THE MISCHIEF URGED BY APPELLEE AND THE COURTS BELOW

Careful analysis of use of the *Ex parte Young*, 209 U.S. 123 (1908), "stripping" doctrine by the courts below and

as urged by appellee Great Western United Corporation (hereinafter "Great Western" or "GWU"), reveals that, on the one hand the appellant Idaho officials are to be treated as "private litigants"[1] or "as an individual defendant and nothing more,"[2] for purposes of federal court jurisdiction over their persons, yet they are deemed to satisfy the "doing business" requirement of the Texas long arm statute[3] because, as the circuit court of appeals stated:

> *Idaho's* "business" is to regulate. *It* was conducting that business in Texas. [Emphasis supplied.][4]

The appellant Idaho officials suggest that in the *Ex parte Young* context the appellee cannot "have its cake, and eat it, too." If, as GWU urges, the Idaho officials are for all purposes to be treated as private individual litigants, then under what guise may the challenged Idaho statutes be declared unconstitutional. For it is only through the *official* state action by the Idaho officials that the challenged state law is brought in issue. Private individuals could not act to enforce such laws.

Appellants suggest that this Court reaffirm the proper limited role of *Ex parte Young* in cases such as this. On the one hand, a state official defendant is not clothed with sovereign immunity under the Eleventh Amendment because he may be acting unconstitutionally, and *Ex parte*

[1]Brief for the Appellee at 41.

[2]Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1265 (1978); (J.S. App. A-12).

[3]Tex. Rev. Civ. Stat. Ann. art. 2031b (Vernon 1964).

[4]577 F.2d at 1268 (J.S. App. A-18).

Young, "strips" him of state immunity for federal court jurisdictional purposes, but on the other hand, his action is state action under the Fourteenth Amendment. In the *Young* context, therefore, there is a constant understanding that the state official—"stripped" for the purpose of bringing him before the court—is at all times acting in his public capacity and conducting "state action." This limited dichotomy should not be expanded, and should be emphasized by this court.

II

SECTION 27 OF THE SECURITIES EXCHANGE ACT OF 1934 IS NOT APPLICABLE TO THE TYPE OF ACTIVITY WHICH OCCURRED IN THIS CASE

A. Subject Matter Jurisdiction is Lacking over the Activity Complained of.

The underlying rationale behind the Securities Exchange Act of 1934 is a congressional intent to eliminate "sharp practices" and fraudulent schemes involving securities.[5] Nowhere in the Act or in the decisions relating thereto is there any intimation that an effect of the Act would or could be to enjoin actions of state officials who are, like federal officials, regulators of securities activities rather than persons engaged in securities transactions which are subject to proscriptions and regulation of the Act.

[5]*See, e.g.* Hooper v. Mountain States Securities Corp., 282 F.2d 195, 205 (5th Cir. 1960), cert. denied, 365 U.S. 814 (1961); Errion v. Connell, 236 F.2d 447, 454 (9th Cir. 1956); Goodman v. H. Hentz & Co., 265 F.Supp. 440, 446 (N.D. Ill. 1967).

In discussing the scope of authority under section 28(a) of the Securities Exchange Act of 1934 for nonconflicting state laws, a federal court in New York has made the following salient observations:

> The fiduciary responsibilities of corporate directors are in the first instance defined by the law of the state of incorporation. Federal securities legislation supersedes state corporate law remedies only to the extent of any direct conflict between the two, § 28(a), Securities Exchange Act, 15 U.S.C.A. § 78bb(a); [other citations omitted], and unless a matter is covered exclusively by federal statute, it is deemed to be subject to state law. If Congress had intended to preempt the entire field, "so revolutionary a federal intervention", Loss says "would presumably have been clearly expressed", II Loss, Securities Regulation 903. Thus, Although federal securities laws have been construed broadly in the light of their remedial purposes. [citations omitted], they remain "incomplete and interstitial" in nature [citation omitted], and do not represent a federal corporate law with respect to responsibility of officers and directors that has supremacy over state law, which Congress has never adopted.[6]

This concept of interrelationship between federal and state regulation in the securities field obtains as well for consideration of the status of the Williams Act and its engraftment into the underlying Securities Exchange Act of 1934.

Appellee GWU, supported by the courts below, contends that the enactment and enforcement of state law which al-

[6]Kaminsky v. Abrams, 281 F.Supp. 501, 504-05 (S.D. N.Y. 1968).

legedly is in "conflict" with federal law for section 28(a) purposes rises to the dignity of a civil "violation" of the 1934 Act for section 27 jurisdiction and venue purposes. Not a single case supports this bizarre rationale, and, in fact, basic rules of statutory interpretation preclude such a result, for as yet another federal court has noted:

> However, "The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of the interest of another if; (a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and (b) the interest invaded is one which the enactment is intended to protect. * * *" Restatement, Torts, Vol. 2, Sec. 286. This rule is more than merely a canon of statutory interpretation. The disregard of the command of a statute is a wrongful act and a tort.[7]

Nowhere in the Securities Exchange Act of 1934 is there language which makes enforcement of a state law regulating corporate takeovers a prohibited act, nor is there a required act therein that the appellant Idaho officials have failed to perform, nor is there any "command of a statute" which these officials have failed to heed. There is simply nothing in the Securities Exchange Act of 1934 which the Idaho officials can realistically be said to have "violated" for section 27 jurisdiction and venue purposes. The cases cited by GWU for the proposition that a civil "violation" of the 1934 Act confers federal court jurisdiction under

[7]Kardon v. National Gypsum Co., 69 F.Supp. 512, 513 (E.D. Pa. 1946).

section 27 all involve situations where specific mandates and proscriptions of the Act have been breached.[8]

B. Personal Jurisdiction Was Wrongly Asserted Over the Idaho Officials.

Appellee GWU notes that several federal courts contend that due process considerations are not germane to the assertion of personal jurisdiction under federal law and federal service of process rules (Brief for the Appellee at 49-51) inasmuch as "minimum contacts" analysis has no place in consideration of nationwide, but not extraterritorial, jurisdiction. With such a contention the appellant Idaho officials disagree, since it confuses the notion of nationwide service of process with fundamental fairness principles which inhere in Fifth Amendment due process considerations. If minimum contacts analysis and fundamental fairness due process principles do not obtain in actions brought under federal jurisdictional statutes such as section 27 of the Securities Exchange Act of 1934, then only the venue provisions of such a statute (or other applicable federal venue statute) would prevent blatant forum shopping. While it may be a pleasant thought to some to envision the United States as a single federal monolith with federal courts in the various federal districts entitled to exercise nationwide reach in personal jurisdiction issues,

[8]Gratz v. Claughton, 187 F.2d 46 (2d Cir. 1951) [violation of § 16(b)]; Mariash v. Morrill, 496 F.2d 1138 (2d Cir. 1974) [violation of § 16(b)]; Fitzsimmons v. Barton, 589 F.2d 330 (7th Cir. 1979) [violation of § 10(b) and SEC Rule 10b-5]; Kardon v. National Gypsum Co., 69 F.Supp. 512 (E.D. Pa. 1946) [violation of § 10(b) and Rule X-10B-5]; Grossman v. Young, 70 F.Supp. 970 (S.D. N.Y. 1947) [violation of § 16(b)]; Kramer v. Scientific Control Corp., 365 F.Supp. 780 (E.D. Pa. 1973) [§ 10(b) and SEC Rule 10b-5].

the ability to execute nationwide service of process does not excuse federal courts from remembering that they sit in judicial districts which are formed by state boundaries in a nation of *united states* which exist side-by-side with the federal government in a context of cooperative federalism. Due process remains the rule, and cases such as *International Shoe*,[9] *Hanson v. Denckla*,[10] and the like, provide meaningful considerations by which even federal courts applying federal law should abide.

C. Venue Over the Idaho Officials Lay Solely in the District of Idaho, Not the Northern District of Texas.

Just as section 27 of the Securities Exchange Act of 1934 provides venue for civil or criminal actions constituting "violations" of the Act in any district where the act or transaction constituting the violation occurred "or in the district wherein the defendant is found or is an inhabitant or transacts business, so, too, does section 12 of the Clayton Act provide that venue is proper "not only in the judicial district whereof it [the defendant corporation] is an inhabitant, but also in any district wherein it may be found or transacts business." 15 U.S.C. § 22 (1970). Since the operative language of the two venue statutes is most similar, resort to this Court's decisions under Clayton Act section 12 provides insight into the concept of transacting business. As a circuit court noted:

> The starting point for analysis of the "transacting business" portion of Section 12 is *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, (parallel cites omitted) (1927). There the Court established the

[9]326 U.S. 310 (1945).
[10]357 U.S. 235 (1958).

major premise of the jurisprudence under Section 12, i.e. that the "transacting business" test was added to Section 12 in order to relieve

> the injured person from the necessity of resorting for the redress of wrongs committed by a non-resident corporation, to a district, however distant, in which it resides or may be 'found'—often an insuperable obstacle—enabling him to institute the suit in a district, frequently that of his own residence, in which the corporation in fact transacts business, and bring it before the court by the service of process in a district in which it resides or may be 'found'.

273 U.S. at 373, (parallel cite omitted). * * *

The Court later summarized the effect of the *Eastman Kodak* case on the law of anti-trust venue. "The practical every-day business or commercial concept of doing or carrying on business 'of any substantial character' became the test of venue." [Citation omitted.][11] For the purpose of inquiry herein, however, it is clear that in the context sanctioned by this Court, the appellant Idaho officials at no time "transacted business" in the Northern District of Texas so that venue might be laid there under that pretext. Though the "doing business" concept for section 27 venue purposes has not been relied upon as heavily by appellee as has section 27 venue on the basis of "any act or transaction constituting the violation," the commercial activity emphasis is worthy of note not only for section 27 venue purposes but also as that concept underlies assertion of personal jurisdiction through the Texas long arm statute, which will be discussed below.

[11]A. L. Black v. Acme Markets, Inc., 564 F.2d 681, 686 (5th Cir. 1977). (*Quoting from* United States v. Scophony Corp., 333 U.S. 795, 807 (1948).)

Simply stated, GWU contends and the courts below assert that the conduct of an Idaho official in Idaho "occurred" where it had an effect. The irony of such anaysis is that the section 27 phrase "in the district wherein any act or transaction constituting the violation occurred" implies that there can only be a single district in which venue is proper. Thus, a holding that venue is proper in the Northern District of Texas forecloses venue being laid in the District of Idaho. The operative language does not allow venue in a district where an act or transaction *in furtherance* of the violation occurred, but only in the district where an act or transaction *constituting the violation* occurred. Thus, appellants submit, the cases of *Jacobs v. Hanson* and *S-G Securities, Inc. v. Fuqua Investment Co.*[12] cited by GWU (and cases cited therein) unjustifiably expand the plain, restrictive language of section 27 itself.

Curiously, GWU quotes (Brief for the Appellee at 65) from the case of *A.L. Black v. Acme Markets, Inc.*[13] in support of its section 27 venue assertions. The case is wholly inapposite to the case at bar inasmuch as it relates to antitrust and tort claims wherein venue is based solely on "transacting business" and "commercial contact" with the forum, both under section 12 of the Clayton Act and under the Texas long arm statute.

Throughout the conduct of this action, appellee and the authorities cited by appellee have maintained that the concepts of personal jurisdiction (and in the section 27

[12][CURRENT] CCH FED. SEC L. REP. ¶ 96,770 (D. Del. Feb. 6, 1979 and [CURRENT] CCH FED. SEC. L. REP. ¶ 96,750 (D. Mass. Dec. 19, 1978). *Cited in* Brief for the Appellee at 64-65.

[13]564 F.2d 681 (5th Cir. 1977).

context, subject matter jurisdiction) and venue may be addressed virtually identically. The admonishment of the Second Circuit in *United States ex rel. Rudick v. Laird*,[14] seems appropriate:

> Because appellee seems to confuse the principles of jurisdiction with those of venue, at the outset it is necessary to restate the difference between the two. The concepts of personal jurisdiction and venue are closely related but nonetheless distinct. Jurisdiction is the authority to hear and determine a cause; it is, in essence, the power to adjudicate the action. If a court lacks jurisdiction over an action, it lacks the power to act with respect to that action. Venue, on the other hand, does not involve the power of authority to adjudicate a controversy. It relates solely to the place where jurisdiction should or may be exercised. Venue is a forum limitation imposed for the convenience of the parties. As a concept of convenience rather than of jurisdiction, it may be conferred on a court either by consent or by the failure of the defendant to make a timely objection. In either case, whether it is conferred by consent or waiver, the court may render a valid judgment, whereas lack of jurisdiction cannot be waived, and a court without jurisdiction is without power to render a valid or binding judgment. Thus venue deals with the question of which court, or courts, of those which possess adequate personal and subject matter jurisdiction, may hear the specific matter in question. In short, jurisdiction must first be found over the subject matter and the persons involved in the cause before the question of venue can be properly reached. [Citations omitted.][15]

[14]412 F.2d 16 (2d Cir. 1969), *cert. denied*, 396 U.S. 918 (1969).
[15]412 F.2d at 20.

Appellant Idaho officials submit that section 27 is a wholly inappropriate vehicle for use in this instant action, not only because it is not properly applied to state official regulators of securities transactions who are not themselves subject, as regulators, to the duties and proscriptions of the Securities Exchange Act of 1934 generally, but also because no duty or proscription of that Act has been breached, due process standards have not fairly been applied, and venue concepts have been misconstrued and misapplied.

III

THE TEXAS LONG ARM STATUTE DOES NOT REACH IDAHO OFFICIALS ACTING IN A NON-COMMERCIAL MANNER IN ENFORCING IDAHO LAW

Though the Texas long arm statute[16] is interpreted to reach to the furthest limits of constitutional due process, such due process considerations are germane *only* when the threshold requirement of activity within the purview of the statute has been met. Without engaging in a discussion of what the Texas legislature *might* have done in passing a long arm statute, it is clear from the text of the existing Texas law that its scope is limited by the concept of "engag[ing] in business" in Texas.[17] For purposes of the statute, the Texas legislature has specifically declared that two activities:

> (1) entering into a contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State; or

[16]Tex. Rev. Civ. Stat. Ann. art. 2031b (Vernon 1964).
[17]art. 2031b, § 3.

(2) the committing of any tort in whole or in part in this State

are "deemed doing business in this State."[18] The specifically defined activities constituting "doing business" are not exclusive, and "other acts that may constitute doing business" may also subject a person or company to Texas long arm jurisdiction.[19]

Though appellee urges that technical and abstruse attempts to consistently define "doing business" need not be engaged in (Brief for the Appellee at 56), there remains no way to obscure the fact that "doing business" is a condition precedent for long arm statute application. As Professor Thode notes: " 'Doing business' is still the test for state regulation, but the limits on jurisdiction for the purpose of suing a nonresident are greatly enlarged."[20] Though appellee quotes from the recent Texas Supreme Court decision in *U-Anchor Advertising, Inc. v. Burt*[21] to the effect that focus on due process concepts is more desirable than attempts to grapple with "doing business" definitions (Brief for the Appellee at 56), it is clear from a previous statement in that case that "doing business" requirements of Texas law were satisfied:

> The contract in question obligated Burt to perform his payment obligations at the office of U-Anchor in Amarillo, Texas, and thus he was "doing business" in Texas within the meaning of the statute. We agree

[18]art. 2031b, §4.

[19]*Id.*

[20]Thode, *In Personam Jurisdiction; Article 2031B, the Texas "Long Arm" Jurisdiction Statute; and the Appearance to Challenge Jurisdiction in Texas and Elsewhere*, 42 TEX. L. REV. 279, 303 (1964).

[21]553 S.W.2d 760 (Tex. 1977), *cert. denied*, 98 S.Ct. 1235 (1978).

> that in this respect, as well as with respect to "other acts that may constitute doing business," Article 2031b reaches as far as the federal constitutional requirements of due process will permit.[22]

There is no plausible construction of the activities of the appellant Idaho officials which will cause the commercial overtones of the "doing business" requirement to be satisfied. Appellee urges fulfillment of the "doing business" requirement through the Fifth Circuit's statement that: "*Idaho's* 'business' is to regulate. *It* was conducting that business in Texas."[23] (Brief for the Appellee at 56.) The logic fails for several reasons. Two Idaho officials, stripped of their sovereign immunity through *Ex parte Young*, are the defendants/appellants in this action, not the State of Idaho; thus it is immaterial what the "business" of the State of Idaho is. Moreover, just as the phrase "none of your business" has no commercial overtones and in no way relates to the concept of "doing business" in its ordinarily recognized sense for long arm statute purposes, so too, is the phrase that Idaho's " 'business' is to regulate" incapable of meeting the normal "doing business" concepts—all of which imply commercial, profit-oriented activity which state official regulators acting in a governmental capacity do not engage in. (*See* discussion of this Court's understanding of the "doing business" concept for antitrust law purposes at II C above.) The other cases cited by appellee in support of its contention that the "doing business" requirements of long arm statutes may be disregarded and focus made solely on due process standards all involve situations

[22]553 S.W.2d at 762.

[23]577 F.2d at 1268; (J.S. App. A-18).

where statutory threshold requirements which brought the activity within the purview of the statute were met.[24]

Notwithstanding the fact that threshold requirements of Texas law are not met for long arm jurisdiction purposes, due process standards (already discussed at length in Brief for the Appellants at 42 to 51) are lacking.[25]

Finally, appellee leans heavily upon *Maney v. Ratcliff*, 399 F.Supp. 760 (E.D. Wis. 1975). Though the case, apparently not appealed, is a shocking one both in terms of

[24]Southern Machine Co. v. Mohasco Indus., Inc., 401 F.2d 374 (6th Cir. 1968) [Tennessee long arm statute; business activity in state with physical presence of reps. of defendant in state]; Eyerly Aircraft Co. v. Killian, 414 F.2d 591 (5th Cir. 1969) [Texas long arm statute; tort in state together with continual and substantial business in state]; Black v. Acme Markets, Inc., 564 F.2d 681 (5th Cir. 1977) [Texas long arm statute; antiturst action against corp. with substantial business activity in Texas]; Southern National Bank of Houston, Tex. v. Tri-Financial Corp., 317 F.Supp. 1173 (S.D. Tex. 1970) [Texas long arm statute; contract to be performed in whole or in part in Texas, and tort committed in whole or in part in Texas]; Maricopa County v. American Petrofina, Inc., 322 F.Supp. 467 (N.D. Cal. 1971) [Arizona long arm statute; defendant "caused an event to occur in this state out of which the claim which is the subject of the complaint arose"]; Darden v. Heck's Inc., 459 F.Supp. 727 (W.D. Va. 1978) [Virginia's long arm statute; single business act within Commonwealth which resulted in tortious injury where architect made trips to construction site in Virginia]; State ex rel. Sperandio v. Clymer, 568 S.W.2d 935 (Mo. 1978) [Missouri long arm statute; commission of a tortious act within the state]. Hess v. Pawlowski, 274 U.S. 352 (1927), cited by appellee correctly upholds extraterritorial jurisdiction over a nonresident motorist who has been involved in an automobile accident in the forum state on the grounds of physical presence in the state at the time of the jurisdiction causing event. The "doing business" requirement for Texas long arm jurisdiction was not invented by the appellants; it is wholly and solely a creature of the Texas legislature, who have, in their wisdom, included that "limitation" on Texas' long arm jurisdiction ability.

[25]This case presents an excellent opportunity for this Court to demonstrate that its footnote language in *Nevada v. Hall*, 47 U.S.L.W. 4261, 4265 n. 24 (Mar. 5, 1979), has substance and that we truly continue to have a "constitutional system of cooperative federalism."

the tortious activity which formed the basis of the suit and the decision to allow jurisdiction in Wisconsin, the jurisdictional result (stripped of any questions of applicability to governmental officials generally) is distinguishable from the case at bar for several reasons. First, the officials sued were local government officials, not state officials (who are usually afforded greater legal protection than local officials). Second, the Wisconsin long arm statute specifically authorized jurisdiction for tortious acts or omissions outside the state which caused local injury with some additional contact with the State (in this case continued solicitation of the plaintiff's arrest).[26] The Wisconsin law contained no limitation based on an initial link of "doing business" in any general or specifically defined manner in whole or in part in that State, as does the relevant Texas law. Third, the defendants participated in a continued series of activity over a period of three separate arrests in which they deliberately solicited results in Wisconsin twice and New York once by appealing to various local officials to hold the plaintiff in custody. The case is wholly inapposite to the facts of this instant action.

IV

VENUE UNDER THE APPLICABLE GENERAL FEDERAL VENUE STATUTE IS IMPROPER IN THE NORTHERN DISTRICT OF TEXAS

At the outset it must be reiterated that this lawsuit resulted from the desire of appellee Great Western to conduct business in Idaho, not from some overt act of an Idaho official attempting to assert extraterritorial juris-

[26]399 F.Supp at 768.

diction over a company fortuitously based in Texas which had no business contacts with Idaho. In response to this purposeful activity by appellee the single acting Idaho official acted in Idaho to enforce Idaho law, the impact of which was felt by GWU in Texas—and everywhere else in the United States that it did business. "Historically, venue has been geared primarily to the convenience of the defendant rather than that of the plaintiff since it is the defendant who is brought into court."[27] If it is to remain true that a claim is deemed to arise only in one place for § 1391 venue purposes[28] then under the "place where the claim arose" analysis alone, Idaho could not be in the district of venue despite the fact that all relevant activity took place in that district.[29] As noted above in discussing venue under § 27 of the Securities Exchange Act of 1934, appellee and others fail to make distinction between venue and personal jurisdiction questions—an issue which has already been discussed at length in Brief for the Appellants at 62 to 65.

Appellants note that in defending a lengthy and complex action in federal court in the District of Idaho brought by Sunshine Mining Company under the Williams Act, GWU did not challenge the fact that venue was laid in Idaho. Yet, if the theory advanced by GWU and the courts below is correct, the proper place for venue in that action

[27]Reuben H. Donnelley Corp. v. FTC, 580 F.2d 264, 269 (7th Cir. 1978). *See* comment on the historical development of federal venue statutes in Brief for the United States as Amicus Curiae in *Stafford v. Briggs*, No. 77-1546 at 50 to 54.

[28]15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, *Jurisdiction* § 3806 at 26-29 (1976).

[29]Of course, Idaho would be a proper district for § 1391 venue as the place where all defendants reside.

was the Northern District of Texas inasmuch as that district is where the impact of Sunshine's challenge to GWU's tender offer had its effects or consequences.[30]

V

FEDERAL LAW HAS NOT PREEMPTED STATE LAW IN THE SECURITIES REGULATION FIELD, UNDER THE WILLIAMS ACT OR OTHERWISE

Though appellants have already discussed preemption considerations in their Brief for the Appellants at 66 to 84, a few of the cases noted by GWU merit further comment. In *New York Central R.R. Co. v. Winfield*, 244 U.S. 147 (1916), this Court declared:

> Whether and in what circumstances railroad companies engaging in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the Nation as a whole is interested and there are weighty considerations why the controlling law should be uniform and not change at every state line.[31]

Thus, two factors distinguish *Winfield* as a preemption case: (1) railroads have traditionally been subjected to federal preemption doctrines in a number of areas, and (2) the traditional federal/state interrelationship which inheres in the securities field (and is formally recognized by Congressional act and decisions of this Court) does not exist with regard to railroad regulation (wherein the states may affect only limited activities). In the case of the Williams Act, unlike the Federal Employer's Liability Act at

[30]Sunshine Mining Co. v. Great Western United Corp., (1977-78 TRANSFER BINDER) CCH FED. SEC. L. REP. ¶ 96,049.

[31]244 U.S. at 149.

issue in *Winfield*, federal takeover law was engrafted into an existing federal scheme wherein federal preemption does not exist except as specifically and narrowly carved out by the literal terms of federal law. In *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964), federal patent law preemption of state law was found because the operative state law would have given exclusive protection of unlimited duration to an idea and product which was not worthy of patent (with exclusive rights for a fixed term of years) under federal law.[32] Thus, the state law would have acted to emasculate federal law, rather than to fill in the interstices of federal law and provide additional investor protection as do state corporate takeover laws such as Idaho's.

The fact that preemption should not be found herein is underscored by a point-by-point analysis of what an offeror would have to go through under Idaho blue sky law (the Idaho Securities Act) to make an exchange tender offer, as compared to the requirements of the Idaho Corporate Take-Over Law with regard to cash tender offers which is set forth at length in the Appendix hereto. The analysis demonstrates that compliance with the Idaho Securities Act in an exchange offer statutorily requires a greater degree of itemized disclosure of investment information than does compliance with the Idaho Corporate Take-Over Law for cash tender offers. The Idaho requirements would apply in all instances where an exchange offer is not a national coordinated offer under which the several states have agreed to accept a copy of the SEC registration for compliance with state disclosure rules.

[32]376 U.S. at 231.

There is simply no reason why cash tender offer actions for corporate control should enjoy some "special," privileged position when *all* other modes of acquiring corporate control or changing corporate structure are subject to deliberation and state regulation.

VI

THE IDAHO CORPORATE TAKE-OVER LAW DOES NOT UNDULY BURDEN INTERSTATE COMMERCE

The extraterritorial reach of the Idaho Corporate Take-Over Law appears to be its most controversial aspect. Yet, without such a reach the law would only apply in Idaho and would, no doubt, result in Idaho investors being ignored and left out of any national cash tender offer. GWU refers to an English case to support its contention that "Tobago [cannot] pass a law to bind the rights of the whole world",[33] yet the crux of the problem the English court had with the Tobago law was that the law utterly failed to provide the defendant with notice and an opportunity to be heard in the Tobago courts—not that Tobago substantive law was defective or not entitled to recognition.

Other cases raised by appellee on the issue of extraterritoriality are distinguishable. In *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149-50 (1934), this Court merely held that a state could not extend the effect of its laws beyond its borders so as to destroy or impair the rights of citizens of other states to make a contract not operative within that state, and law-

[33]Buchanan v. Rucker, 103 Eng. Rep. 546, 547 (1808). *See* discussion of this case in *Hilton v. Guyot*, 115 U.S. 113, 179 (1895), which discusses at length application of full faith and credit and comity principles to foreign law judgments.

ful where made. The court recognized the right of a state to prohibit enforcement within its borders of a contract, legal elsewhere, but violative of local state law. In the corporate takeover field, a complex situation arises. Even though a tender offeror might make a series of contracts outside the regulating state and not operative within the regulating state, the net effect of those contracts in the aggregate is to affect a corporate entity based in the regulating state wherein the investors with whom the contract is made have a fiduciary relationship with company management. Though target company management may avoid applicability of the Idaho Corporate Take-Over Law by approval of a proposed tender offer, this result is based on no other consideration than the state's belief that it has a limited interest in interfering with acts which meet corporate management approval under standards of high fiduciary responsibility. Quite the contrary is true when target company management rejects a tender offer. In such a case, the Williams Act provides no method whereby shareholders are offered more than skeletal investment information about the tender offeror, and provides no opportunity for an auction market to occur. Idaho prefers to indulge in the speculation that most corporate management is responsible management which takes its fiduciary responsibility to corporate shareholders seriously, rather than to indulge in the speculation which underlies comments about the Williams Act which almost raises a presumption that incumbent management is "entrenched" or "ineffective." Because target company management, in fulfilling a fiduciary role, has no means under federal law in providing target company shareholders with information about the

tender offeror which is more detailed and broad in scope than that provided by the Williams Act, and because this management has no means whereby it may effectively delay the consummation of a tender offer so that shareholders may reflect upon information provided by federal law or otherwise or have an opportunity to be offered more for their shares either by the initial or a competing tender offeror as a result of an auction market, states have stepped in to fill the void left by the minimal federal requirements. Of course tender offerors and arbitrageurs do not like state laws, much prefering the limited role of the Williams Act. But many states have deemed that shareholders deserve more and that tender offerors and arbitrageurs have no inherent right to snap up bargains at the expense of shareholders who tender their shares based on sketchy information of what may be the future of the company whose shares they hold. State laws provide for these investors a protection through delay and disclosure which those with a fiduciary responsibility to them cannot provide under existing law.

Unlike the situation in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), Idaho is not trying to protect the economic welfare of its citizens by guarding them against cheaper prices from outside the state, but is, instead, trying to insure that Idaho investors are treated *equally* with all other investors in the Nation—and that all investors are able to make choices based upon informed considerations and the opportunity to be offered the highest price for their shares. Although the Idaho Corporate Take-Over Law does purport to have a necessary and incidental extraterritorial reach it is not that dissimilar from the Cali-

fornia law at issue in *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935), wherein this Court noted that "the power of a state to effect legal consequences is not limited to occurrences within the state if it has control over the status which gives rise to those consequences."[34] In the context herein, Idaho has the power to regulate certain corporate activities of a target company which meets the criteria which trigger enforcement of the Idaho Corporate Take-Over Law, as well as to protect the investors of that company. GWU takes great issue with the fact that only about 2% of Sunshine Mining Company's shareholders reside in Idaho. Yet, the exhibit disclosing the extent to which shares of Sunshine are distributed throughout the United States (A. 36) reveals that the highest total number of shares are owned by shareholders in New York (2,453 shares), despite the fact that such a figure, upon closer inspection, will merely reveal that much Sunshine stock is held by stock brokerages in "street name" for actual owners of that stock residing elsewhere. Thus, we have no "true" figures to reveal the actual number or percentage of Idaho shareholders of Sunshine. Nor is the number of Sunshine shareholders who reside in Idaho the relevant consideration, for *all* Sunshine shareholders have a beneficial relationship with Idaho through those who represent them in Idaho in a fiduciary capacity. It is beneficial for all Sunshine shareholders to have some state which may take an interest in insuring that they make informed choices when being solicited to tender all or a portion of their Sunshine stock, and that they be able to do so with the benefit of an auction market should one

[34]294 U.S. at 541.

arise. Though it is unfortunate that an auction market did not arise with regard to the GWU tender offer for Sunshine shares that fact merely is reflective of the troubled condition the company was in as the result of its earlier mine disaster and recent strike—it was simply "unattractive" to other potential offerors. Such has not been the case in other tender offers, and state laws have allowed the formation of an auction market in which shareholders ended up being offered more for their shares than the initial offeror opened the bidding with.[35] GWU also makes much of the fact that state takeover laws allow inefficient, entrenched management to perpetuate themselves in office (or at least attempt to). This contention has become a rubric in the tender offer context, yet is not borne out in fact inasmuch as most tender offers, once begun, are completed and the target company "goes somewhere."[36] In the case of Sunshine, after GWU's successful partial tender offer "entrenched" management (though disliked by many and blamed by others for the tragic mine disaster) was retained.

A final comment is reserved for *State v. McCormick*, 273 N.W.2d 624 (Minn. 1978), wherein the Minnesota Supreme Court rightly recognized that the case before it was "a criminal case not subject to the same flexibility enjoyed by the more elastic rules covering extraterritorial jurisdiction in civil cases."[37]

The appellants fully recognize the uniqueness of this case and the extraterritorial reach of the Idaho law in

[35]*See* Brief for the Appellants at 97, n. 182 & 99, n. 183.
[36]*See* Brief for the Appellants at 94, n. 176.
[37]273 N.W.2d at 628.

question. What the appellants ask is that this Court recognize the legitimacy of the Idaho goal of investor protection and place its imprimatur on this limited type of extraterritoriality.

CONCLUSION

For the reasons discussed above and in the Brief for Appellants, the judgments by the courts below should be reversed.

Respectfully submitted,

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SPECIAL DEPUTY ATTORNEY
GENERAL OF IDAHO
Counsel for Appellants

April 13, 1979

(Appendix Follows)

APPENDIX

APPENDIX

This is a comparison between Idaho Code Section 30-1423 —REGISTRATION BY QUALIFICATION and Idaho Code Section 30-1503—REGISTRATION OF TAKE-OVER OFFERS.

The purpose of this comparison is to determine whether or not the Idaho Corporate Take-Over Law in fact requires a more detailed presentation of investment disclosure than a filing and registration by qualification under the Idaho Securities Act.

The Idaho Securities Act at Section 30-1423 (1)(2)(3)(4)(7)(8) states:

> "Any security may be registered by qualification. A registration statement under this section shall contain the following information and be accompanied by the following documents, in addition to payment of the registration fee prescribed in section 30-1437, Idaho Code;
>
> (1) with respect to the issuer and any significant subsidiary; its name, address, form or organization, the state or foreign jurisdiction and date of its organization and the location of its business, the nature and market for any proposed products or services, and a description of its physical properties and equipment,
>
> (2) with respect to every director and officer of the issuer, or person occupying a similar status or performing similar functions; his name, address, principal occupation for the past five (5) years, the amount of securities of the issuer held by him as of a specified date within ninety (90) days of the filing of the registration statement, the remuneration paid and any direct

or indirect material interest by contract, security holdings or otherwise in the company or in any affiliated company or nearby property that may be benefited by any activities of the company,

(3) with respect to any person not named in subsection (2) of this section owning of record or beneficially, if known, ten per cent (10%) or more of the outstanding shares of any class of equity security of the issuer; the information specified in said subsection (2) other than his occupation,

(4) with respect to every promoter, not named in subsection (2) of this section, if the issuer was organized within the past three (3) years; the information specified in said subsection (2), any amount to be paid to him by the issuer within that period or intended to be paid to him, and the consideration for any such payment,

(7) the estimated cash proceeds to be received by the issuer from the offering, the purposes for which the proceeds are to be used by the issuer, the amount to be used for each purpose, the amounts of any funds to be raised from other sources to achieve the purposes stated and the sources of any such funds, if any part of the proceeds is to be used to acquire any property including goodwill, otherwise than in the ordinary course of business, the names and addresses of the vendors and the purchase price,

(8) a description of any stock options or other security options outstanding or to be created in connection with the offering, together with the amount of any such options held or to be held by every person required to be named in subsections (2), (3), (4), (5) or (7) of this section and by any person who holds or will hold ten percent (10%) or more in the aggregate of any such options,"

The Idaho Corporate Take-Over Law at section 30-1503 (2)(a) states:

"REGISTRATION OF TAKE-OVER OFFERS.—(2) The registration statement shall be filed on forms prescribed by the director, and shall be accompanied by a consent by the offeror to service of process specified in section 30-1436, Idaho Code, and the filing fee specified in section 30-1508, Idaho Code, and shall contain the following information and such additional information as the director by rule prescribes:

(a) All of the information specified in section 30-1502(1), Idaho Code, any part of which may be incorporated by reference to the extent that it was previously filed."

Section 30-1502(1)(a)(b)(c)(d)(e) states:

"FILING OF OWNERSHIP INFORMATION.—(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a target company, is directly or indirectly a beneficial owner of more than five percent (5%) of any class of the outstanding equity securities of the issuer shall, within ten (10) days after such acquisition, file with the director on a form prescribed by him a statement containing the following information and such additional information as the director by rule prescribes:

(a) The identity and background of all persons on whose behalf the acquisition of any equity security of the target company has been or is to be effected,

(b) The source and amount of funds or other consideration used or to be used in acquiring any equity security, including a statement describing any securities which are being offered in exchange for the equity securities which are being offered in exchange for the equity securities of the target company, and if any

part of the acquisition price is or will be represented by borrowed funds or other consideration, a description of the transaction and the names of the parties thereto.

(c) If the purpose of the acquisition is to gain control of the target company, a statement of any plans or proposals which such person has, upon gaining control, to liquidate the target company, sell its assets, effect its merger or consolidation, or make any other major change in its business, corporate structure, management or personnel.

(d) The number of shares or units of any equity security of the target company of which each such person and each associate of such person and each person included as an offeror is the beneficial owner or which each such person has a right to acquire, directly or indirectly, together with the name and address of each such person.

(e) Material information as to any contracts, arrangements or understandings with any person with respect to any equity security of the target company, including transfers of any equity security, joint ventures, loan or option arrangements, puts and calls, guarantees of loan, guarantees against loss, guarantees of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements or understandings have been entered into."

ANALYSIS: The disclosure requirements of the Securities Act and the Take-Over Law are broad in scope. Both laws require comprehensive disclosure about the identity of persons engaged in a tender offer or persons owning, or controlling the activities of a securities issuer. Both laws

require disclosure of any contractual agreements with the securities issuer on agreements concerning the equity securities of a target company.

The Take-Over Law generally limits its disclosure requirements to the background and identity of the purchaser; the source and amount of funds used in the acquisition of the equity securities of a target company; the purpose of the acquisition; the amount and number of shares acquired and owned by the purchaser, and the nature of any agreements to acquire additional equity securities of a target company.

The Idaho Securities Act exceeds the disclosure required by the Take-Over Law by seeking disclosure concerning the issuers ownership of any affiliated company or nearby property that may be benefitted by any activities of the issuer or any promoter of the issuer if it was organized within three years of the date of the filing of a registration statement.

The Idaho Securities Act at section 30-1423 (5)(10)(11)(15) states:

"Any security may be registered by qualification. A registration statment under this section shall contain the following information and be accompanied by the following documents, in addition to payment of the registration fee prescribed in section 30-1437, Idaho Code;

(5) the capitalization and long-term debt on both a current and a pro forma basis of the issuer and any significant subsidiary, including a description of each security outstanding or being registered or otherwise offered, the market therefor and a statement of the

amount and kind of consideration whether in the form of cash, physical assets, services, patents, goodwill, or anything else for which the issuer or any subsidiary has issued any of its securities within the past two (2) years or is obligated to issue any of its securities,

(10) any adverse order, judgment or decree previously entered in connection with the offering by any court or the United States securities and exchange commission, a description of any pending litigation or proceeding to which the issuer is a party and which materially affects its business or assets including any such litigation or proceeding known to be contemplated by governmental authorities,

(11) any adverse order, judgment or decree entered within the previous ten (10) years or in litigation in connection with any other offering of securities or practice involving securities against the issuer, its subsidiary or parent organizations, or persons required to be named in subsections (2), (3) or (4) of this section pursuant to this offering.

(15) a balance sheet of the issuer as of a date within four (4) months prior to the filing of the registration statement, a profit and loss statement and analysis of surplus for each of the three (3) fiscal years preceding the date of the balance sheet and for any period between the close of the last fiscal year and the date of the balance sheet, or for the period of the issuer's and any predecessor's existence, if less than three (3) years and, if any part of the proceeds of the offering is to be applied to the purchase of any business, the same financial statements which would be required if that business were the registrant, and"

The Idaho Take-Over Law at section 30-1503(2)(c) states:

"(2) The registration statement shall be filed on forms prescribed by the director, and shall be accompanied by a consent by the offeror to service of process specified in section 30-1436, Idaho Code, and the filing fee specified in section 30-1508, Idaho Code, and shall contain the following information and such additional information as the director by rule prescribes:

(c) Material information concerning the organization and operations of any offeror which is a corporation, including the year, form and jurisdiction of its organization, a description of each class of its capital stock and long-term debt, a description of the business done by the offeror and its subsidiaries and any material changes therein during the past three (3) years (3) years, a description of the location and character of the principal properties of the offeror and its subsidiaries, a description of any material pending legal or administrative proceedings in which the offeror or any of its subsidiaries is a party, the names of all directors and executive officers of the offeror and their material business activities and affiliations during the past three (3) years, and financial statements of the offeror for its three (3) most recent annual accounting periods and any current period."

ANALYSIS: Both laws require disclosure of the capitalization of: the issuer, and any significant subsidiary (under the Securities Act). The offeror and its subsidiaries (under the Take-Over Law). The Take-Over Law limits its requirements to "material information." The Securities Act requires disclosure about *any transaction* in which the issuer has issued its securities or the securities of a subsidiary within two years from the date of filing a registration statement.

The Idaho Securities Act at section 30-1423(6)(12)(13) states:

"(6) the kind and amount of securities to be offered, the amount to be offered in this state, the proposed offering price and any variation therefrom at which any portion of the offering is to be made to any persons except as underwriting and selling discounts and commissions, the estimated aggregate underwriting and selling discounts, commissions and other promotional fees including separately cash, securities, or anything else of value, to accrue to the underwriters in connection with the offering, the estimated amounts of other selling expenses and legal, engineering and accounting expenses to be incurred by the issuer in connection with the offering, the name and address of every underwriter and every recipient of a promotional fee, a copy of any underwriting or selling group agreement pursuant to which the distribution is to be made, or the proposed form of any such agreement whose terms have not yet been determined, and a description of the plan of distribution of any securities which are to be offered otherwise than through an underwriter,

(12) a copy of the prospectus or circular and any supplementary advertising script or selling literature intended as of the effective date to be used in connection with the offering. No other or additional script, sales material or literature shall be communicated to more than ten (10) persons during the offering without written or telegraphic permission of the director,

(13) a specimen or copy of the security being registered, a copy of the issuer's articles of incorporation and by-laws, as currently in effect, and a copy of

any indenture or other instrument covering the security to be registered,"

The Idaho Take-Over Law at section 30-1503(2)(b) states:

"(2)(b) Three (3) copies of the proposed take-over offer, including all material terms thereof, in the form proposed to be published or sent or delivered to security holders of the target company."

ANALYSIS: Both laws require disclosure of the terms of the securities offering or offer to purchase. The Securities Act sets forth specific disclosure requirements concerning the terms of the offering. The Take-Over Law only requires filing three copies of the proposed take-over offer and the disclosure of all material terms of the offer.

The Idaho Securities Act and the Idaho Take-Over Law are designed to effect full and complete disclosure of investment information. The disclosure requirements of the Take-Over Law do not appear to exceed the disclosure requirements of the Idaho Securities Act. In fact, the Idaho Securities Act appears to require by statute a greater degree of itemized disclosure of investment information.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978
No. 78-759

DAVID H. LEROY, Attorney General of Idaho; and TOM D. MCELDOWNEY, Director of Finance of the State of Idaho,

Appellants,

vs.

GREAT WESTERN UNITED CORPORATION,

Appellee.

On Appeal From the United States Court of Appeals for the Fifth Circuit

Brief of Amici Curiae States of California, Montana, North Carolina and Vermont in Support of Appellants

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IN THE

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Brief of Amici Curiae States of California, Montana, North Carolina and Vermont in Support of Appellants

The State of California, joined by the States of Montana, North Carolina and Vermont, respectfully submits that the ruling of the Court of Appeals on the question of jurisdiction was incorrect, and, if not reversed, could have a substantial adverse impact on state governments generally.

Specifically, these amici submit that an exercise of a purely governmental power cannot be characterized as "doing business" in another state and cannot support a finding of personal jurisdiction over a state officer located outside the forum state.

Interest of These Amici

The primary concern of these amici arises from the potential consequences of a rule which would require a state to appear in a foreign state to defend the validity of its legislative or administrative action in either state or federal courts located in the foreign state.

These amici recognize that a state's exercise of its governmental powers may be reviewed in a federal court located within the state by means of the doctrine of *Ex parte Young* (1908) 209 U.S. 123; that is, that the state governmental act which is the subject of the action may be regarded as the act of the state's agent, even though he is merely following the dictates of his state's Legislature in his action; the objection arises when this fictitious doctrine is used to create jurisdiction in a court located outside the state.

Similarly, these amici also recognize that a state may subject itself to jurisdiction in a distant forum by physical presence in the forum (*Hall v. University of Nevada* (1972) 8 Cal.3d 522, 503 P.2d 1363, cert. den., 414 U.S. 820; *People v. Steeper* (1957) 12 Ill.2d 204); or by engaging in proprietary activity within the forum (*Parden v. Terminal R. Co.* (1964) 377 U.S. 184).

The question presented here, however, does not involve proprietary activity, nor an act done in the forum state. This case involves a purely governmental activity done entirely within the boundaries of the foreign state,

but which has alleged consequences in the forum state. The effect of the Fifth Circuit decision is to create an avenue for review of the validity of one state's laws in courts located in another state, a practice which would greatly diminish the independence of the states.

ARGUMENT

One of the two alternate bases for personal jurisdiction found in this case rests upon those provisions of rules 4(d)(7) and 4(e) of the Federal Rules of Civil Procedure, which measure the scope of personal jurisdiction of U.S. district courts by the scope of jurisdiction afforded to state courts by the laws of the state in which the courts are located. Accordingly, the holding extends beyond the question of federal court jurisdiction alone.

The Texas statute defining personal jurisdiction for Texas courts authorizes assertion of personal jurisdiction over nonresidents to the limits of due process. (Tex. Rev. Civ. Stat. Ann. art. 2031(b) (Vernon).) The Fifth Circuit decision, therefore, holds that an officer of one state may be sued in another state if his performance of duty within his home state can be characterized as "doing business" within the forum state.

These amici believe that the mere act of communicating an inquiry or response across a state border cannot supply a jurisdictional basis for extraterritorial review of state governmental action.

By state "governmental action", we mean to encompass such activity as the enactment of state constitutional and statutory provisions, the promulgation of administrative regulations, guidelines, or policies, and the making of decisions pursuant to such provisions of law or policy. These matters, we submit, are best

reviewed in courts located within the boundaries of the defendant state.[1]

The Fifth Circuit correctly noted that the limits of extraterritorial personal jurisdiction are based upon questions of fairness of subjecting a defendant to suit in a distant forum. Amici submit that, in the context of a federal system of independent sovereign states, it is not fair to compel a state officer to appear in another state to defend a purely governmental act. It is obvious that both the state and federal courts of any state are trained primarily in the laws of the forum state; to the extent that the law of another state differs, it will be strange and unfamiliar to the forum, and it is only human to be suspicious of that which is unfamiliar. A plaintiff seeking to invalidate a regulatory act on constitutional grounds should be required to maintain his action in those courts which will be most familiar with the system of law of which the challenged act is a part. Permitting him to go elsewhere invites "forum-shopping" of a sort in which the forum of choice is the least informed.

The Court of Appeals attempted to analogize the instant case to cases which have applied the "doing business" test for jurisdiction over a nonresident defendant by saying, "Idaho's 'business' is to regulate. It was conducting that business in Texas." (*Great Western*

[1]Amici recognize that litigation between private parties can raise issues which require a court to determine the constitutionality of a law of another state. Such situations are unavoidable and quite obviously do not present the same problem for state governments as are present here.

United v. Kidwell (1978) 577 F.2d 1256, 1268.) The premise is patently incorrect. Government is not business. To say that governing is the "business" of a state is as sensible as saying that eating or sleeping is the business of a human being. Idaho's activity and its purpose is regulation, but regulation is not business and cannot be made so by slogan. The distinction between governmental functions and proprietary activities of government has long been recognized.

This Court's most recent analysis of the problem of minimum contacts was in *Kulko v. Superior Court of California, Etc.* (1978) .... U.S. ...., 98 S.Ct. 1690. In that case, the court observed the distinction between the consequences of commercial activity on the one hand and personal relations on the other. (98 S.Ct. at 1699.) The same distinction exists with respect to purely regulatory activity by a state. Unless a state engages in a proprietary activity or "purposefully avails itself of the privilege of conducting activities within the forum State," *Hanson v. Denckla* (1958) 357 U.S. 235, 253, it should not be forced to defend itself in a foreign state.

Conclusion

For the foregoing reasons, the States of California, Montana, North Carolina and Vermont respectfully submit that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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Plaintiff-Appellee

On Appeal from the United States Court
of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS AMICUS CURIAE

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IN THE

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On Appeal from the United States Court
of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE BY THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

The National Association of Insurance Commissioners (NAIC) hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the appellants has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of the NAIC in this case, as more fully detailed at pages 1-4 of the attached brief, arises from the fact that NAIC members are charged with the responsibility of comprehensively regulating the insurance

business in their respective states. Such regulatory responsibility necessarily extends to tender offers and other acquisitions of domestic insurance companies. The Idaho law challenged in this case provides, as do most such state laws, for hearings involving the insurance commissioner whenever insurance companies are the subject of a tender offer within the scope of the law. More significantly to NAIC members, provisions of the Idaho Corporate Takeover Law being challenged on preemptive grounds in this case are similar in all material respects to those included in the insurance holding company laws of forty-three states and the District of Columbia. The alleged constitutional impediments in the Idaho law are the same as those which are being asserted against the Insurance Holding Company Act of at least one NAIC member in a case pending in the United States District Court, Eastern District of Louisiana, *Roussel v. Boren,* No. 78-2345, (E.D. La.).

By virtue of the 1970 amendments to the Williams Act provisions of the Securities Exchange Act of 1934, equity securities of insurance companies were brought within the scope of the tender offer regulation prescribed in that Act. Because the states comprehensively regulate the insurance business, not only pursuant to state law but also in accordance with congressional direction provided by the McCarran-Ferguson Act, 15 U.S.C. §§1011-1015 (1970), the NAIC is uniquely situated to develop the argument that Congress did not intend to preempt states from regulating tender offers as evidenced by congressional acceptance of state insurance regulation.

Although the relevance of this case to the constitutionality of the corporate takeover laws of other states has been amply noted by the parties and the lower court opinion, there has been no concern expressed for the precedential effect this case portends for state insurance regulation of tender offers and other corporate acquisitions. In this respect, the NAIC believes that it stands in a relevant and unique position to urge a circumspect review on preemption grounds of the law challenged in this case. If the argument presented in the attached brief is accepted, it would be dispositive of the preemption issue presented by this case.

Respectfully submitted,

/s/

Richard A. Hemmings
One of the Attorneys of
Record for the National
Association of Insurance
Commissioners

February 22, 1978

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IN THE

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DAVID H. LEROY,
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Plaintiff-Appellee

On Appeal from the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF THE AMICUS CURIAE

The National Association of Insurance Commissioners (NAIC) is a voluntary association of the principal insurance regulatory officials charged by law with the responsibility of supervising the business of insurance within each state, the District of Columbia, Guam, Puerto Rico and the Virgin Islands.

The individual state insurance commissioners who comprise the NAIC, and the insurance-consuming public on whose behalf NAIC members regulate, have a vital interest in the outcome of this case. In light of the substantial public interest in a viable, competitive and responsible insurance industry, a comprehensive system of

insurance regulation has evolved in every state. By virtue of the McCarran-Ferguson Act, 15 U.S.C. §§1011-1015 (1970), which in 1945 threw the weight of Congress behind the existing system of state insurance regulation, the states are actively engaged in comprehensive regulation.

The NAIC believes this case reflects a disturbing tendency by federal district and appellate courts to assert personal jurisdiction over state officials. Countenance of jurisdiction asserted in foreign and distant courts may substantially impair the ability of the states to deal with common regulatory problems, as a result of the expense and time required to defend suits in distant jurisdictions, to the detriment of the public interest. The NAIC supports and adopts the arguments of the appellants on the jurisdictional issues raised by this case. However, the interests of the NAIC in the resolution of such issues are in all material respects identical to those of the appellants. Consequently, the jurisdictional issues will not be separately addressed by the NAIC.

The interests of the NAIC similarly extend to the appellants' position on the commerce clause issue presented by this case. While the NAIC supports and adopts the position of the appellants in arguing for reversal of the lower court's commerce clause determination, that argument will not be separately developed by the NAIC. However, regardless of the outcome on the merits in this case of the commerce clause issue, the NAIC notes and endorses the distinction drawn in dictum by the Fifth Circuit Court of Appeals on the varying application of commerce clause limitations to state law. In particular, the court observed that:

> When Congress has exempted state laws from commerce clause restrictions it has used language specifically directing that certain interstate commerce may be regulated as though it were purely local. [citation omitted] Congress has also stated that, in the absence of affirmative congressional action, courts shall impose no barriers on state regulation. *See* the McCarran-Ferguson Act, 59 Stat. 33, 15 U.S.C. §1011 *et seq. Great Western United Corp. v. Kidwell,* 577 F.2d 1256, 1281 (5th Cir. 1978).

It is the opinion of the NAIC that this distinction is an essential limitation on the resolution of the commerce clause issue facing this Court.

The NAIC's particular and most vital interest in this case stems from the decision of the court below on the preemptive relationship of the Securities Exchange Act of 1934 and its Williams Act provisions with the Idaho Corporate Takeover Law. The Idaho law, like most similar state laws, applies to insurance companies, Idaho Code §30-1512(1), and provides for the involvement of the state insurance commissioner in any determination made under the law by the state with respect to insurance companies. Of even greater interest to the NAIC, most states have enacted insurance holding company laws, applicable *inter alia* to tender offers for domestic insurance companies. The holding company laws contain operative provisions similar to those challenged in the Idaho Corporate Takeover Law. Although the insurance holding company laws have been enacted for the purpose of protecting insurance policyholders rather than stockholders, the preemption analysis of the lower court on its face would appear to apply to state insurance commissioners enforcing such laws.[1] Because the lower

[1] "The test of whether both federal and state regulations may operate or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 143 (1963).

court determined there to be an inherent, irreconcilable conflict between state laws applicable to tender offers and the national regulatory scheme for tender offers said to be established by the Williams Act, this action presents an issue of major significance to members of the NAIC in carrying out their insurance regulatory responsibilities.

The NAIC respectfully submits this brief to express its concern on the constitutionality of state tender offer regulation generally and the relevance of the issue to state insurance regulation. The NAIC will specifically argue that the Idaho Corporate Takeover Law is not preempted by the Williams Act.

ISSUE PRESENTED

Whether Congress, in enacting the Williams Act amendments to the Securities Exchange Act of 1934 for the purpose of regulating tender offers and other corporate acquisitions, has preempted the states from regulating corporate tender offers and acquisitions in a manner that differs from that adopted in the Williams Act amendments to the Securities Exchange Act of 1934.

SUMMARY OF ARGUMENT

The Fifth Circuit's finding of state law preemption in connection with the Williams Act provisions of the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.* (1976) misconstrued the preemption doctrine. Preemption of state tender offer regulation is on its face inconsistent with Section 28 of the Securities Exchange Act of 1934, 15 U.S.C. §78bb(a). That provision expressly saves state regulation not "in conflict" with the 1934 act. There has in this case been no showing of state law conflict with the provisions of the Securities Exchange Act.

Even if state tender offer regulation is not saved by the express provisions of the Securities Exchange Act, the preemption analysis of the lower court was in error. State corporate takeover laws operate in a field traditionally occupied by the states. This Court's preemption decisions have found state law to be preempted only when there is evident a clear and unmistakable congressional purpose to oust state regulation. Conflict with state law must be irreconcilable. Not only is there no clear preemptive purpose or inevitable conflict with the Williams Act, but the purpose said to have been frustrated by the state law was incorrectly identified. The purpose Congress sought to achieve in the Williams Act was protection of investors, rather than avoiding delay in tender offers or maintaining a neutral balance between offerors and the target company management. The challenged state law must be measured against the investor protection standard. There has been no showing that the state law harmed investors or that it was in any other way incompatible with investor protection.

Examination of other relevant congressional and administrative action reinforces the argument that Congress entertained no preemptive intent in enacting the Williams Act. Application of the Williams Act to tender offers for insurance companies necessarily implies congressional acceptance of concurrent state regulation. Congress has acted to make state insurance regulation supreme as it relates to the business of insurance. State insurance regulators are necessarily concerned with tender offers for insurance companies and other shifts in corporate control in fulfilling their regulatory responsibility.

Congress has also acted to implement merger rules drawn from the antitrust perspective that provide for

longer tender offer periods than those inferred from the Williams Act. This and similar congressional action belies any carefully constructed balance of tender offeror-target interests that lies at the heart of the lower court's preemption analysis.

Similarly, the Securities and Exchange Commission has proposed substantially longer minimum periods during which tender offers must remain open than those which may be inferred from the Williams Act. A major pretext for concluding that Congress intended to preempt the states is the scheme of the Williams Act. The tender offer system set forth in the Act is said to evidence a purpose to strike a neutral balance between tender offer contestants by avoiding delay in tender offers. The commission proposals clearly negate any commission understanding of this preemptive purpose. Contrary to the view of the lower court, Congress has not clearly expressed any purpose upon which to preclude concurrent state regulation of tender offers. The state tender offer systems cannot be said to be in conflict with the investor protection objectives of federal law. Therefore, the decision of the lower court should be reversed.

ARGUMENT

Introduction

The lower court's decision in *Great Western United Corp. v. Kidwell,* 577 F.2d 1256 (5th Cir. 1978) to invalidate the Idaho Corporate Takeover Law under the Supremacy Clause, U.S. CONST., art. VI, places in serious doubt the constitutionality of state law regulating the execution of corporate acquisitions and mergers. In particular, the decision necessarily implies that the general

corporate takeover laws of numerous other states are invalid.[2] Similarly the viability of forty-four state insurance holding company laws[3] which apply to tender offer bids has been rendered suspect.

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[2] The Fifth Circuit opinion lists thirty-one jurisdictions having corporate takeover laws as of the date the case was considered by that court. 577 F.2d 1256, 1261.

[3] *See* ALA. CODE §27-29-3(d)(1)(b) (Supp. 1973); ALASKA STAT. §21.22.030(2) (1966); ARIZ. REV. STAT. ANN. §20-481.07 (1975); ARK. STAT. ANN. §66-5005(d)(l)(ii) (1966); CALIF. INS. CODE §1215.2(d)(2) (West 1972); COLO. REV. STAT. ANN. §10-3-803(5)(b) (West 1969); DEL. CODE tit. 18, §4930(b)(4), 4932(b)(4) (1975); D.C. CODE ANN. §35-1903(d)(1)(B); GA. CODE ANN. §56-3403(d)(1)(ii) (1977); IDAHO CODE ANN. §41-3805(1)(b) (1977); ILL. ANN. STAT. ch. 73, §743.8(1)(b) (Supp. 1977); IND. ANN. STAT. §27-1-23-2(d)(1)(ii) (Burns 1975); IOWA CODE ANN. §521A.3(4)(a)(2) (1977); KAN. STAT. ANN. §40-3304(d)(1)(B) (1973); KY. REV. STAT. ANN. §304.37-010 (Baldwin 1971); LA. REV. STAT. ANN. §22:731(2)(a) (Supp. 1977); MD. ANN. CODE art. 48a §494(e)(ii) (Supp. 1977); MASS. GEN. LAWS ANN. ch. 175, §193M(d)(1)(ii) (West 1972); MICH. STAT. ANN. §500.1315(1)(b) (Supp. 1978); MINN. STAT. ANN. §60D.02(4)(1)(ii) (Supp. 1978); MISS. CODE ANN. §83-6-1 (1977); MO. REV. STAT. §382.060(1)(2) (Vernon Supp. 1978); MONT. REV. CODE ANN. §40-5511(d)(1)(ii) (1961); NEB. REV. STAT. §44-2108(1)(b) (1974); NEV. REV. STAT. §692C.210(1)(b) (1975); N.H. REV. STAT. ANN. §401-B:3VI(a)(2) (Supp. 1975); N.J. REV. STAT. §17:27A-2(d)(1)(ii) (1970); N.M. STAT. ANN. §58-30-7(B) (1962); N.Y. INS. LAW §69-f(2)(f) (McKinney 1966); N.D. §3.1 Rules and Reg. Regarding Takeover Bids (1977); OHIO REV. CODE ANN. §3901.32 (1971); OKLA. STAT. tit. 36, §1653(d)(1)(ii) (West 1976); ORE. REV. STAT. §732.540(1)(e) (1977); PA. STAT. ANN. tit. 40, §459.6(d)(4) (Purdon 1971); R.I. GEN. LAWS §27-35-2(d)(1)(ii) (Supp. 1976); S.C. CODE ANN. §37-1408(1)(ii) (Supp. 1975); S.D. COMPILED LAWS ANN. §58-5A-9(2) (1969); TENN. CODE ANN. §56-3612-3615 (Supp. 1976); TEX. INS. CODE ANN. art. 21.49-1, §5(e)(1)(ii) (Vernon 1963); UTAH CODE ANN. §31-39-2(4)(b) (1974); VT. STAT. ANN. tit. 8, §3683(f)(1)(B) (1971); VA. CODE ANN. §38.1-178.1:4(2) (1976); WASH. REV. CODE ANN. §48.31A.050(1)(b) (Supp. 1976); W. VA. CODE §33-27-3(d)(1)(ii) (1975).

In its factual description of the Idaho Corporate Takeover Law,[4] the Fifth Circuit noted these salient characteristics:

> Idaho's takeover law required Great Western, among other things, (1) to submit to the Director of the Idaho Department of Finance a preeffective filing disclosing Great Western's intention to make a tender offer and the terms of the offer; (2) to transmit, at the same time, a copy of that filing to Sunshine; (3) to publish an advertisement describing the intention to make an offer and the proposed material terms; (4) to pay the Idaho registration fee; (5) to participate in a hearing, which would be mandatory if Sunshine requested one; and (6) to delay its tender offer until the final judgement of any administrative or injunctive proceeding brought by the Director of Finance. . . . 577 F.2d 1256, 1263 (1978).

This factual description is in most material respects applicable to the insurance holding company laws of the several states. These insurance laws are in most states patterned after the NAIC Model Insurance Holding Company Act which includes provisions which require filing, notice to the person being acquired, a public hearing, and approval of the insurance commissioner for any acquisition of control.[5] The Insurance Holding Company laws of the several states are specifically applicable to tender offers for control of domestic insurers.[6]

In effect, the decision of the circuit court broadly supplants the legislative intent and wisdom of the great majority of states. Given the long-established pattern of parallel state and federal regulation of securities transactions and the primary role of the states in corporate governance, the circuit court's decision miscarried in its application of constitutional law doctrine. The decision of the court below ignores the stricture of this Court in deciding cases of parallel state and federal jurisdiction. "[T]he 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists'." *Huron Cement Co. v. Detroit,* 362 U.S. 440, 446 (1966); *Exxon Corp. v. Governor of Maryland,* — U.S. —, 57 L.Ed. 2d 91, 103 (1978).

[4] Idaho Takeover Statute, IDAHO CODE §§30-1501-1513 (Cum. Supp. 1977).

[5] §§3(a), (d), NAIC Model Insurance Holding Company System Regulatory Act, II PROCEEDINGS OF NAIC, 738-751 (1969).

[6] *See, e.g.* NAIC Model Insurance Holding Company System Regulatory Act, Sec. 3(a), II PROCEEDINGS OF NAIC 738-751 (1969); ILL. ANN. STAT. ch. 73 §743.4 (Supp. 1977); MINN. STAT. ANN. §60D.02 (Supp. 1973).

I. THE PREEMPTION DOCTRINE WAS INCORRECTLY APPLIED BY THE LOWER COURT

Invalidation of state law by operation of the supremacy clause, U.S. CONST. art. VI, is not to be lightly concluded. "[H]ypothetical conflict is not sufficient to warrant preemption." *Exxon Corp. v. Governor of Maryland,* — U.S. —, (1978). 57 L.Ed. 2d 91, 103 (1978). There has, in the instant case, been *no* finding that the Corporate Takeover Law of Idaho was in conflict with the provisions of the Williams Act. In discussing its application of the preemption doctrine, the lower court acknowledged it did "not focus on those [arguable] inconsistencies nor decide whether they would be sufficient to preempt Idaho's law . . . ." 577 F.2d at 1275.

The preemption doctrine has been developed from the supremacy clause of the U.S. Constitution which states that the Constitution and federal law "made in Pursuance thereof . . . shall be the supreme Law of the Land. . . ." U.S. CONST., art. VI, cl. 2. Prior decisions of this Court have

clearly laid out the path to be followed in resolving preemption issues. First, state law is to be preempted where Congress has expressly declared its intent to exclude state regulation in a particular field. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 229-230 (1947). A second test applied by the Court will invalidate state law where it affects a field occupied by federal law in which the federal interest is so dominant that congressional intent to preempt state law can be inferred. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973). Finally, a third test has been used to preempt state laws where it is shown that the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). It was the third test upon which the lower court relied to invalidate the Idaho Corporate Takeover Act. A brief reflection upon the first two tests does sustain their inapplicability to any determination of preemption in this case.

In resolving preemption issues, the Court's first inquiry concerns congressional intent to preclude state regulation of the particular aspects of commerce presented by the case. Congress, pursuant to its power to regulate interstate commerce, U.S. CONST., art. I, §8, may of course prohibit state regulation in a particular area of commerce. The Fifth Circuit Court correctly noted that "[n]othing in the 1934 [Securities Exchange] Act explicitly preempts all state takeover legislation; indeed, §28 has a contrary tone." 577 F.2d at 1275. The Idaho corporate takeover law, as evidenced by the specific language of §28 of the 1934 act, is thus clearly not subject to express statutory preemption.

In accordance with the second test, it has been held that state law may be invalidated if congressional intent to preclude parallel state regulation can be inferred. Such a result is compelled where Congress has "unmistakably . . . ordained," *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963), that its enactments alone must apply to some part of commerce occupied by federal law. "This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973). The circuit court below explicitly noted that it did not infer, on the basis of dominant federal interests in the field occupied by the Williams Act, Congressional intent to preclude application of state law.[7] Even if it had, the conclusion that no preemption could be inferred is inescapable, both on the basis of Section 28 of the 1934 Securities Exchange Act, of which the Williams Act is a part, and on the basis of prior case law and the underlying traditional role of the state in regulating corporate activities and their security transactions. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 137 (1973); *SEC v. National Securities, Inc.*, 393 U.S. 453, 461 (1969).

Recognizing that the first two preemption tests involving either an explicit or inferred preemption do not support a finding of preemption in this case, the circuit court framed its decision around the third preemption test which was articulated in *Hines v. Davidowitz*, 312 U.S. 52 (1941). The Fifth Circuit's application of the *Hines*

[7] "We need not reach the question whether Congress implicitly ruled out all state legislation of tender offers when it amended the 1934 Act with the Williams Act." 577 F.2d at 1275.

test appears to have been strongly influenced by the use of that test in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).[8] The preemption test set forth by *Hines* and *Jones* was adequately described by the Fifth Circuit opinion:

> Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U.S. CONST., Art. VI. The criterion for determining whether state and federal laws are so inconsistent that state law must give way is firmly established in our decisions. Our task is "to determine whether, under the circumstances of this particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). 577 F.2d at 1274-1275.

Notwithstanding the possible relevance of the *Hines* operational test of preemption, the Fifth Circuit Court incorrectly applied that test to the facts of this case. This conclusion is based upon two critical errors in the opinion of the lower court. First, the court made no effort to reconcile the operation of a presumptively valid state law with an obvious purpose or objective of Congress. Secondly, the court below erred in determining what con-

[8] In dismissing Idaho's preemption arguments, the lower court concluded that "the appellant's definition of 'conflict' is too narrow for the usual preemption test; *Jones* ambiguously reaffirms that in general the *Hines* test rather than a more limited examination for contradictions is the proper one." 577 F.2d 1256, 1276. Whatever *Jones* implies as to the general preemption test to be used, that case involved decisions based upon explicit preemption clauses of the federal Weights and Measures Act, 21 U.S.C. §678 (1972), and the Fair Packaging and Labeling Act, 15 U.S.C. §1461 (1974). Those laws scrutinized in *Jones* clearly expressed an intent to broadly displace state law which is "less stringent" or "different than" the federal law. In sharp contrast, the Securities Exchange Act expressly saves state law, displacing it only when in "conflict." 15 U.S.C. §78bb(a).

gressional purpose was relevant to the preemption question. To each of these errors we now turn.

A. There Was No Application of the Test of Irreconcilable Conflict to Preemption of the Idaho Corporate Takeover Law

1. The Need for Irreconcilable Conflict with a Clearly Expressed Congressional Purpose

In cases where the field which Congress is said to have preempted has traditionally been occupied by the states, the decisions of this Court appropriately have started "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

In a recent case, the Court more particularly noted the importance of maintaining the proper balance of state and federal regulatory interests in the securities area. "Absent a clear indication of congressional intent, we are reluctant to federalize the substantive portion of the law of corporations that deals with transactions in securities." *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 479 (1977). The assumption that state law is valid, where it applies to an area traditionally regulated by the states, provides assurance that the proper federal-state balance is maintained and that it "will not be disturbed unintentionally by Congress or unnecessarily by the Courts." *Jones v. Rath Packing Co.*, 430 U.S. at 525 (1977).

In rejecting Idaho's argument that explicit statutory conflict is necessary to find preemption, the lower court also erroneously rejected any need to reconcile operation of the state and federal laws. In so doing, the reliance of the court below on *Jones* is at best superficial. While

Jones may support application of the *Hines v. Davidowitz,* 312 U.S. 52 (1941) test of preemption to the instant case, *Jones* also demonstrates that the *Hines* test was misinterpreted by the lower court in this case.[9] Unlike *Jones,* there is in this case no "clearly stated . . . major purpose", 430 U.S. at 541, of federal law that can be said to have been frustrated. To the contrary, there was nothing more than consideration of hypothetical conflict with some inferred objective or purpose of Congress. "[I]n this as in other areas of coincident federal and state regulation, the 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists'." *Exxon Corp. v. Governor of Maryland,* — U.S. —, 57 L.Ed. 2d 91, 103 (1978); *Huron Cement Co. v. Detroit,* 362 U.S. 440, 446 (1966).

[9] The lower court's reliance on *Jones v. Rath Packing Co.,* 430 U.S. 519 (1977) was misplaced. In that case, California law regulating the average weight of packaged commodities was preempted by federal law. The preemption analysis, as applied to respondent Rath Packing Co. and its packaged bacon, was based upon an explicit preemption provision in the federal Weights and Measures Act, 21 U.S.C. §678 (1972). "This explicit preemption provision dictates the result in the controversy between Jones and Rath." 430 U.S. at 530-531. Neither the Williams Act nor the remainder of the Securities Exchange Act explicitly preempts state corporate takeover laws. The other respondents in *Jones* presented a question of conflict between the same state law and federal law governing net weight labeling of miller's flour. In finding preemption of the state law by the federal Fair Packaging and Labeling Act (FPLA), 15 U.S.C. §1461 (1974) this Court relied upon a specific purpose stated in the federal law. "As Congress *clearly stated,* a major purpose of the FPLA is to facilitate value comparisons among similar products." 430 U.S. at 541 (emphasis added). The application in Jones of the preemption test articulated in *Hines v. Davidowitz,* 312 U.S. 52 (1941), depended upon a finding of a specific objective or purpose of Congress in the FPLA that was frustrated by state law. There is no specific purpose set forth in the Williams Act, nor the remainder of the Securities Exchange Act of 1934, nor the underlying legislative history, that provides a basis for overriding the Idaho Corporate Takeover Law. At best finding such a purpose must be the result of supposition and inference.

Recent decisions of this court unmistakably underscore the requirement of a clear showing of congressional purpose or intent to establish preemption. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117 (1973). *Merrill Lynch* presented a preemption claim based upon a stock exchange employment termination rule, a self-regulatory rule issued pursuant to the Securities Exchange Act, that was in conflict with state labor law. In reviewing and constraining the purpose of the federal law, the Court noted that its "analysis is to be tempered by the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' " 414 U.S. at 127.

Moreover, the Court in *Goldstein v. California,* 412 U.S. 546, 554-555 (1973), emphatically cautioned against needless findings of conflict:

> We must be careful to distinguish those situations in which concurrent exercise of a power by the Federal Government and the States or by the States alone *may possibly* lead to conflicts and those situations where conflicts *will necessarily* arise. "It is not . . . a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a preexisting right of [state] sovereignty." The Federalist No. 32, p. 243 (emphasis in original).

Also standing in stark contrast to the decision of the lower court in the instant case is this Court's decision in *Kewanee Oil Co. v. Bicron Corp.,* 416 U.S. 470 (1974). In *Kewanee,* the Court considered whether a conflict existed between a patent clause of the U.S. Constitution and a state trade secret law applicable to patentable inven-

tions. The state law allowed a monopoly to continue in perpetuity rather than for seventeen years as provided by federal patent law. The Court again applied the *Hines* test, but reconciled the operation of the two laws: "Each has its particular role to play, and the operation of one does not take away from the need for the other." 416 U.S. at 493. By enacting state corporate takeover laws, states are similarly responding to considerations that are traditionally within the sphere of state corporation law.

Whether or not the *Hines* test is correct in determining preemption of state corporate takeover laws by the Williams Act, that test cannot be applied in a fashion requiring merely some conflict between the state law and *any possible* objective or purpose of Congress. Rather, if preemption exists at all, it must exist because of inevitable conflict between some readily discernible purpose of Congress and the operation of the state law. To hold otherwise would effectively destroy the ability of the states to regulate in any field also occupied by federal law. This proposition is, of course, incompatible with federalism, the Tenth Amendment of the United States Constitution and the previous decisions of this Court.

2. No Clearly Expressed Purpose That May Displace State Law is Evident on the Face of the Williams Act

a. Section 28 of the 1934 Securities Exchange Act Sets a Clear Test of Irreconcilable Conflict

A great deal has been said in this case by Great Western United Corporation and the lower courts about the objectives and purposes of Congress in enacting the Williams Act amendments to the Securities Exchange Act of 1934. Their emphasis has focused on the legislative history. Concern with the legislative history, however, has

tended to obscure the clear expression of congressional intent in Section 28 of the 1934 act, 15 U.S.C. §78bb(a) (1976). The language employed in the statute — whether or not conclusive — is the foremost guide to congressional intent. *U.S. v. American Trucking Association,* 310 U.S. 534, 543, n. 18 (1940). Section 28 provides in pertinent part that:

> Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder. 15 U.S.C. §78bb(a) (1976).

This provision, enacted in the original 1934 version of the Securities Exchange Act, articulates in clear terms that the standard to be applied in this case is a test of direct conflict.

If anything, this explicit statutory savings clause should operate to narrow the test of conflict applied by the courts rather than to sweep in any objective or purpose of Congress that may be inferred from the legislative history. Section 28 does not say that state law is preempted when some purpose or objective not clearly articulated in the federal law is frustrated, but only when it "conflict[s] with the provisions of this title or the rules and regulations thereunder." 15 U.S.C. §78bb(a) (1976). Notwithstanding Section 28, the lower court conveniently dismissed the relevance of the explicit language of Section 28 in the resolution of this case. As the Fifth Circuit Court put it: "Nor does any reason appear to give the term 'conflict' a special limited meaning in §28 of the 1934 Act. The language of the section does not compel such unusual interpretation." 577 F.2d at 1276. What seems unusual is that

a clear articulation of congressional intent can be so easily avoided.

Since the Williams Act amendments of the 1934 Act are silent on their relation with state law, and since the Williams Act contains no clear expression of congressional purpose aside from providing full disclosure to stockholders, Section 28 seems at the very least to sanction concurrent state law that does not *necessarily* result in conflict with the express terms or objectives of the federal law.[10]

b. There is No Inevitable Conflict Between the Williams Act and the Idaho State Corporate Takeover Law

The lower court acknowledged that the conflict identified in this case was not developed through comparative analysis of the details of the state and federal laws: "[W]e shall not focus on those inconsistencies nor decide whether they would be sufficient to preempt Idaho's law...." 577 F.2d at 1275. Rather, the court focused upon the legislative history and inferred the congressional purpose to avoid delay in tender offers and thereby maintain "deliberate neutrality among the contestants in a tender offer." 577 F.2d at 1277.

Had the Fifth Circuit Court instead decided to focus on the inconsistencies between the federal and state laws, it would necessarily have concluded that no inevitable conflict existed. For example, a major pretext for any alleged conflict lies in those provisions of the Williams Act which relate to the shortest possible time within which a tender offer must remain open. Without focusing on possible inconsistencies, the lower court nevertheless

[10] "Of course, under the securities laws state regulation may coexist with that offered under the federal securities law." *SEC v. National Securities, Inc.*, 393 U.S. 453, 461 (1969).

suggested in a footnote that conflict with the state law could be said to exist with Williams Act provisions used to infer minimum or prescribed time periods. 577 F.2d at 1275 n. 40. In particular, Section 14(d)(5) and (6) prescribe, in effect, minimum periods of time for the accomplishment of a tender offer. In pertinent part they provide:

> (5) Securities deposited pursuant to a tender offer . . . may be withdrawn by . . . the depositor at any time until the expiration of *seven days after* the time definitive copies of the offer . . . are first published or sent . . . to securityholders . . . (emphasis added).
>
> (6) Where any person makes a tender offer . . . for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within *ten days* after copies of the offer . . . are first published or sent . . . to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. . . . (emphasis added). 15 U.S.C. §78 n. (d)(5) and (6).

The Williams Act permits a tender offer to be accomplished within a short period of time, limited only in terms of minimum duration by the seven day withdrawal and ten day pro rata provisions.[11] Consequently, provisions of state law which operate to lengthen the minimum

[11] The Securities and Exchange Commission in its February 5, 1979 comprehensive rulemaking proposal on tender offers, Securities and Exchange Commission Release No. 34-15548 (February 5, 1979), clearly states the commission's understanding that Section 14(d)(6) of the 1934 Act sets "minimum" pro rata acceptance limits. *See* SEC Release No. 34-15548 at 95. The Commission has also proposed that the minimum seven day withdrawal period be extended to fifteen business days, proposed Rule 14d-7(a)(1), SEC Release No. 34-15548.

period might be said to "delay" a tender offer. The Idaho Law in §30-1503 does in fact provide for mandatory advance notice of a tender offer to the target and provide the ability to delay commencement of an offer by means of a hearing. Furthermore, the Idaho law at §30-1503(4) requires prior approval of the offer by the state director of finance where a hearing is called.[12]

However, while the state law may cause delay, nothing prevents the offeror from complying with both the applicable state and federal law. The offeror, after compliance with the state law, must merely comply with the federal pro rata and withdrawal provisions by allowing withdrawal and accepting pro rata deposits within the *minimum* federally prescribed periods *after* the tender offer is declared effective by the state. Preventing delay occasioned by state law in the accomplishment of tender offers is nowhere evident on the face of the Williams Act nor, for that matter, in its legislative history in terms of legislative purposes or objectives. Rather, the Williams Act merely sets minium standards for disclosure and timing of tender offers. The standards of the Williams Act are complemented by rather than in conflict with the additional requirements of state law.

B. The Purpose Congress Sought to Achieve Through the Williams Act Was Investor Protection Rather Than a Neutral Balance of Interests

Even if the test of direct conflict suggested by the terms of Section 28 is inapplicable to the resolution of this case, the lower court erred in identifying the congressional

[12] According to the Idaho law, a hearing may be called where "necessary or appropriate for the protection of offerees. . . ." IDAHO CODE §30-1503(4).

purpose upon which the Williams Act is based. The entire preemption theory of Great Western United Corporation's case and the basis for the lower court's decision is that the Idaho statute provides the target company with the opportunity to delay the takeover bid. Such delay is said to tip the scale of neutrality between the target and the tender offeror, sought in the enactment of the Williams Act, in favor of the target company.

In order to sustain this argument, it is necessary to identify a clearly expressed purpose or objective to avoid delay in tender offer bids and assure the offeror equal footing in presenting its case to stockholders. Beyond that, it is necessary that the state law said to be in conflict must inevitably frustrate the identified purpose. *Goldstein v. California,* 412 U.S. 546, 554 (1973). Since the Williams Act itself provides no support for this argument, the legislative history has been relied upon almost exclusively in developing the novel preemption theory of this case. A fair reading of the legislative history, however, lends no support to Great Western's argument.

This Court has recently had occasion to construe the purposes of the Williams Act in *Piper v. Chris-Craft Industries, Inc.,* 430 U.S. 1 (1977). *Piper* presented the narrow issue of whether a defeated tender offeror has standing to sue for monetary damages caused by violation of the Williams Act. In holding that the offeror did not have standing to sue, the majority opinion of the Court responded emphatically to arguments made by the offeror that Congress established a policy of even-handedness in tender-offer regulation:

> In support of their reading of the legislative history, they [offeror, Chris-Craft and the SEC] emphasize, first, that in enacting the legislation Congress was

intent upon establishing a policy of evenhandedness in takeover regulation. Congress was particularly anxious, Chris-Craft argues, "to avoid tipping the balance of regulation. . . ."

Congress was indeed committed to a policy of neutrality in contests for control, but its policy of even-handedness does not go either to the purpose of the legislation or to whether a private cause of action is implicit in the statute. *Neutrality is, rather, but one characteristic of legislation directed toward a different purpose — the protection of investors.* 430 U.S. at 29. (Emphasis added).

In light of *Piper,* Great Western United Corporation in this case cannot establish a clear and manifest congressional purpose to maintain equal footing between the tender offeror and the target by minimizing delay in commencement of an offer. But rather, the basic purpose of the Williams Act is the "protection of investors."

The legislative history clearly discloses that the purpose of the Williams Act is to require "the disclosure of pertinent information and . . . afford other protection to stockholders. . . ." H.R. REP. NO. 90-1711, 90th Cong., 2d Sess., —, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2811. In construing congressional intent, it is relevant to note that the supposed carefully constructed balance of tender offeror and target interests has been revised in the Williams Act since its original enactment. In 1970, Congress amended the law to reduce the reporting threshold from ten percent ownership to any class of equity securities to five percent. 15 U.S.C. §§78 m(d)(1), 78 n(d)(1). By lowering the level of beneficial ownership needed to trigger the Williams Act, management of a corporation being acquired is afforded an earlier opportunity to develop whatever action it wishes to take in response to the possibility of an acquisition resulting in

a hostile controlling interest. The legislative history of the 1970 amendments discloses nothing about an intentional shift in the supposed balance of offeror-target interests. The legislative history does, however, explicitly disclose the intent to "provide public disclosure of impending corporate takeovers at a more meaningful level." H.R. REP. NO. 91-1655, 91st Cong., 2d Sess., —, *reprinted* in [1970] U.S. CODE CONG. & AD. NEWS 5025, 5027 (1970). Investor protection, rather than the lower court's inferred purpose of "deliberate neutrality among the contestants in a tender offer," 577 F.2d at 1277, was the objective sought by Congress through the Williams Act.

The Williams Act is essentially a minimum standards disclosure law. Nothing in the law precludes delivery of additional information or use of tender offer periods in excess of the minimums prescribed. *See Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 141 (1963). The fact that state law may compel additional disclosure, that it provides for administrative review of the reasonableness of the transaction, or that it may afford the investor additional time to reflect on the merits of a tender offer can hardly be said to be necessarily at odds with the Williams Act's basic investor protection objective. Consequently even if the state law causes some delay in the commencement of a tender offer, such cannot be said to inevitably frustrate a clear purpose of Congress.

II. RELATED CONGRESSIONAL AND ADMINISTRATIVE ACTIVITY DENYNG PREEMPTIVE CONGRESSIONAL INTENT

Subsequent to the original 1968 enactment of the Williams Act provisions, related congressional action as well

as action taken by the Securities and Exchange Commission in implementing the Williams Act substantially diminishes the possibility that Congress entertained any preemptive intent in establishing federal tender offer regulation.

A. Application of the Williams Act to Equity Securities of Insurance Companies Supports Congressional Acceptance of Concurrent State Tender Offer Regulation

Investor protection cannot be said to be inconsistent with state regulation of acquisitions and mergers where the state differs from the system established in the Williams Act. In at least one comprehensively state-regulated industry, Congress has implicitly accepted concurrent state regulation of mergers and acquisitions. Pursuant to the McCarran-Ferguson Act, 15 U.S.C. §§1011-1015 (1970), Congress in 1945 made state law supreme as it relates to the "business of insurance." *Prudential Insurance Co. v. Benjamin,* 328 U.S. 408, 430 (1945). The McCarran Act in pertinent part provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance. . . ." 15 U.S.C. §1012(b).

This Court has clearly stated that state regulation of acquisitions and mergers, in the context of providing protection of policyholders (as distinguished from securityholders) constitutes regulation of the "business of insurance."[13]

[13] The fact that states may regulate insurance acquisitions and mergers was conclusively established by this Court in 1969. At that time, the Court considered the relevance of the 1934 Securities Exchange Act rules applicable to fraud and misrepresentation made in connection with proxy solicitations to the merger of two stock insurance companies, *SEC v. National Securities, Inc.,* 393 U.S. 453 (1969). In *National Securities,* the argument was made by the author of the merger that the McCarran-Ferguson Act, 15 U.S.C. §§1011-1015, precluded application of the 1934 Securities Exchange Act. The merger in *National Securities* was dependent upon prior approval by the state Director of Insurance, and such approval was secured. *National Securities,* in point of relevance, presented nearly an opposite question from that considered in the instant case — namely whether state insurance regulation, by virtue of the McCarran-Ferguson Act, ousts federal securities regulation. The Court concluded that state law regulating securities, rather than the business of insurance, was not entitled to the special treatment accorded state insurance law by the McCarran Act. But at the same time, application of state insurance law to acquisitions and mergers of insurance companies, as that law relates to the interests of policyholders, was clearly reinforced in *National Securities.*

> The applicable [state] statute requires the State . . . to find that the proposed merger would not "substantially reduce the security of and service to be rendered to policyholders" . . . This section of the statute clearly relates to the "business of insurance." *SEC v. National Securities, Inc.,* 393 U.S. 453, 462 (1969).

Any shift in control of an insurer, whether made by tender offer, merger, proxy contest or private offer, is of similar interest to policyholders and the states. In short, state insurance regulation is unquestionably applicable to insurance company acquisitions and mergers as it relates to the "business of insurance."

Against this backdrop, Congress in 1970 amended the Williams Act to specifically apply to equity securities of insurance companies.[14] The 1970 amendments consequently extended the tender offer rules prescribed by

[14] Insurance companies prior to 1970 did not fall within the purview of the Williams Act because of the exemption contained in Section 12(g)(2)(G) of the 1934 Securities Exchange Act, 15 U.S.C. §78 1(g)(2)(G).

the Williams Act to an industry already comprehensively regulated by the states.[15] If Congress had intended that the Williams Act establish a system of tender offer regulation of insurance companies that precluded the application of any state standards, by virtue of the McCarran Act it would have been necessary to relate the Williams Act to the "business of insurance." This Congress did not do.

The fact that there exists a substantial state interest in comprehensively regulating certain industries, such as insurance, suggests that the Court must be circumspect in determining any preemptive intent to oust state regulation. As illustrated by the application of state insurance holding company laws to tender offer acquisitions of insurance companies, states may have legitimate purposes for regulating such transactions that were never even considered by Congress in enacting the Williams Act. For example, the NAIC in 1969 adopted its Model Insurance Holding Company Act[16] requiring prior approval of the insurance commissioner for any proposed acquisition of control, through tender offer or otherwise, of a domestic insurance company. This model has served as the basis for similar state enactments in most states. The commissioner is to withhold approval under this model if he finds that, *inter alia:* (1) the target insurer

[15] At least the following states enacted insurance holding company laws having effective dates in 1970 or before: Connecticut, effective June 11, 1969; Georgia, effective July 1, 1970; Iowa, effective 1970; Maryland, effective July 1, 1969; Massachusetts, effective June 30, 1970; Michigan, effective July 29, 1970; New Jersey, effective April 3, 1970; New York, effective 1969; Oklahoma, effective April 9, 1970; Oregon, effective January 1, 1968; South Carolina, effective 1962; and Tennessee, effective 1970.

[16] NAIC Insurance Holding Company System Regulatory Act, II PROCEEDINGS OF NAIC, 738-751 (1969).

after the change of control could not meet the insurance licensing requirements of the state; (2) the effect of the acquisition would be to lessen competition; or (3) the financial condition of the acquiring party might jeopardize the financial stability of the acquired insurer.[17] Considerations of this sort clearly relate to the "business of insurance" and are therefore clearly sustainable under the McCarran Act and the *National Securities* case.

Nevertheless, like the Idaho Corporate Takeover Law, tender offers for insurance companies are subject to hearing requirements, state approval, notice and other requirements giving the target insurer an opportunity to "delay" a proposed takeover bid. Similarly, states may engage in other tender offer regulation serving purposes analogous to those here described in other industries affected with a special public interest such as utilities or financial institutions. In enacting the Williams Act, Congress cannot be said to have been unmindful of such state interests, especially in the context of insurance since the 1970 amendments to the Williams Act, pertaining to insurance securities, followed so closely this court's 1969 landmark decision in *SEC v. National Securities, Inc.,* 393 U.S. 453 (1969).

Given the relevance of state insurance law to acquisitions and mergers of insurance companies, as supported by *National Securities,* Congress might have provided some specific savings clause for state insurance regulation if such regulation was in fact appropriate, but yet anomalous to the general Williams Act relationship with state laws. There is, significantly, no difference apparent in the Williams Act treatment of insurance company securities from those of any other line of business. Con-

[17] The insurance laws of most states include provisions substantially similar to those of the NAIC model concerning approval of tender offer (or other) acquisitions. *See* citations listed at note 3 *supra.*

gress in 1970 did not seek to apply exclusive takeover regulation to insurance companies just as it sought no exclusivity in any other line of business with the original enactment of the Williams Act. If Congress had desired to apply takeover rules to insurance companies unfettered by state insurance regulation, it would, in light of *National Securities,* have been necessary to specifically oust such state regulation by referring to the "business of insurance." The fact that the 1970 amendments of the Act are entirely silent on this point reinforces the argument that Congress did not entertain any compelling purpose to establish a careful balance of target tender-offeror interests that must not be upset in any way by the states. More significantly, application of the Williams Act to insurance securities evidences congressional acceptance of state acquisition and merger regulation.

B. The 1976 Antitrust Improvements Act Denies Preemptive Intent

The basis for the Fifth Circuit's preemption holding turns on the Williams Act's promotion of evenhanded regulation of contestants in a tender offer bid. Essential to this argument is acceptance of the proposition that Congress in 1968 constructed a careful and deliberate balance between incumbent management and the tender offeror. Supposedly assuring this balance are Williams Act provisions such as the pro rata acceptance requirement, 15 U.S.C. §78 n(d)(6), and the withdrawal period, 15 U.S.C. §78 n(d)(5), for tendered shares. These are said to assure both existing management and offeror a fair opportunity to consider the merits of each position in a contested tender offer.

But Congress in 1976 enacted the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. §18a (1976).

This new premerger notification law established premerger notice and waiting requirements which effectively preclude consummation of a tender offer for large corporations within the scope of the laws for at least fifteen days after the time of notification to the federal government, 15 U.S.C. §18a(b)(1)(B). Not only does this new premerger notification law establish a waiting period of at least 15 days, but notice of a proposed tender offer acquisition must be given to the person being acquired in order for that person to make a filing also required by the law concerning the acquisition's antitrust implications. 15 U.S.C. §§18a(a), (d).[18] Although the rules applicable to cash tender offers are different than those generally established for amicably negotiated mergers, the Hart-Scott-Rodino Act commits Congress to a significantly different tender offer schedule than that alleged to have been purposefully established in the Williams Act.

C. Securities and Exchange Commission Rulemaking Proposals Deny Any Commission Understanding of Preemptive Intent

Although the Securities and Exchange Commission intends to promulgate a comprehensive scheme for regulating tender offers, the commission has yet to adopt final rules respecting most tender offer activity. However, rules proposed by the commission over the last few years

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[18] The Federal Trade Commission rules implementing the Antitrust Improvements Act of 1976 provide for the filing by the person acquiring securities of another of a notification and report form, 43 Fed. Reg. 33,548 (1978) (to be codified in 16 C.F.R. §803.1). Among other things, the filing is to contain an affidavit attesting that the acquiring person has given notice in writing to the person being acquired. 43 Fed. Reg. 33,549 (1978) (to be codified in 16 C.F.R. §803.5). The waiting period prescribed by the Act does not begin to run until the date of receipt by the federal government of the notification report form. 43 Fed. Reg. 33,549 (1978) (to be codified in 16 C.F.R. §803.10).

have expanded required disclosures and lengthened the minimum periods of time applicable to tender offers. The commission in 1976 proposed Rule 14e-2, Exchange Act Rel. No. 12676, 17 C.F.R. §240-14e-2 (1976), which would have required that any tender offer must remain open for at least fifteen business days from the date of first publication. According to the 1976 release on the rule, such a minimum period "would provide a more realistic time frame for security holders to evaluate a tender offer. . . ." [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶30,659, p. 86,695 (August 2, 1976). This proposed rule was published for comment pursuant to the commission's rulemaking authority under section 14(e) of the 1934 Act, 15 U.S.C. §78 n(e). This section of the Act prohibits fraud and manipulation in connection with tender offers. The Commission evidently now has even greater concern for the minimum periods of time within which tender offers may be completed. On February 5, 1978 the commission withdrew the 1976 proposed Rule 14e-2 and substituted a new proposed Rule 14e-1 establishing a minimum thirty business day rule during which tender offers must remain open. SEC Release No. 34-15548 (February 5, 1979). In explaining the need for proposed Rule 14e-1, the Commission states that "[t]ender offers of an excessively short duration increase the likelihood for hasty, ill-considered decision making and the possibility for fraudulent, deceptive, or manipulative acts or practices. . . ." SEC Release No. 34-15548 at 111-112.[19]

[19] The commission goes on in providing background to proposed Rule 6e-1 to evidence substantial agreement with state concerns for tender offers that are conducted without a fair opportunity for shareholder consideration. The commission also evidences its concern with the emerging pattern of state laws:

> The problems engendered by these tender offers of excessively short duration also may have provided part of the stimulus for some of the 36 states which have enacted anti-takeover statutes since 1968. To the extent this was a purpose of such legislation, the attempt to alleviate the problem was laudable, but has resulted in an inconsistent, overlapping and often counter productive pattern of regulation and in many instances may have tipped the carefully construed balance between bidder and subject company envisioned by the Williams Act in favor of [the] subject company. Accordingly, the commission believes that a uniformly applied federal regulation would better serve the purposes and policies of the Williams Act . . . . SEC Release No. 34-15548 at 112.

Whatever the commission's opinions as to the need for singular or uniform federal regulation, the preemption question facing this Court is whether Congress intended to preclude state regulation of tender offers. The action proposed by the SEC, to broaden disclosure and lengthen the time periods within which tender offerors must operate, on its face denies any commission understanding of a careful and deliberate balance drawn by Congress. The commission in fact admits the need for regulation of the sort provided by the states. If state regulation is to be ousted, there must be a clear expression of congressional intent to that effect. The action taken by the commission, notwithstanding what it says about uniformity, suggests that the commission does not agree with the preemptive purpose identified by the lower court.

In addition to its general rulemaking authority, the Williams Act specifically provides that the Securities and Exchange Commission may by rule prescribe time periods different than those included in the Act for shareholder withdrawal and pro rata acceptance of tendered shares. 15 U.S.C. §78 n(d)(5) and (6). To date the Commission has yet to adopt final rules to implement these statutory tender offer requirements including those relevant to the establishment of a minimum withdrawal and pro rata acceptance periods for tender offers. However, the commission has proposed Rule 14d-7(a)(1) which would extend the statutory seven day withdrawal right, 15 U.S.C. §78 n(d)(5), to fifteen business days from the commencement date of the tender offer. In addition, proposed Rule 14d-7(a)(2) operates to further extend withdrawal rights for ten business days following a competing tender offer made by the target company

or another bidder. SEC Release No. 34-15548. These and other similar proposals by the commission strike at the heart of arguments made concerning preemptive congressional intent to avoid delay and thereby strike a neutral balance between tender offerors and target company management.

Contrary to the lower court's analysis, as borne out by subsequent congressional and administrative action, Congress was not intent in the Williams Act on establishing a carefully-drawn neutral balance between tender offer contestants, but rather sought to protect investors. This latter objective has not been shown in this case to be at odds with the challenged state law.

CONCLUSION

The NAIC urges this Court to reverse the decision of the Fifth Circuit. In enacting the Williams Act, Congress entertained no intent to preclude parallel state regulation of tender offers that serves to promote investor protection or other legitimate state interests. The preemption analysis of the lower court erroneously focused upon characteristics of federal legislation that serve to promote, but do not establish, the purpose of investor protection. The state law challenged in this case shares this congressional purpose and complements federal law.

Respectfully submitted,

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In the

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-759

DAVID H. LEROY, Attorney General of Idaho, and TOM D. MCELDOWNEY, Director of the Department of Finance of the State of Idaho,

Appellants,

v.

GREAT WESTERN UNITED CORPORATION,

Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

OBJECTION OF APPELLEE TO MOTION OF NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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OBJECTION OF APPELLEE TO MOTION OF NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS FOR LEAVE TO FILE BRIEF AMICUS CURIAE

GREAT WESTERN UNITED CORPORATION, Appellee, objects to the Motion of the NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS (NAIC) for Leave to File a Brief *Amicus Curiae*, which was served on February 23, 1979, on the following grounds:

(1) This case does not involve the constitutionality or enforceability of any state insurance holding company laws

which might be applicable to tender offers for control of a domestic insurance company. The target company, Sunshine Mining Company, was and is principally engaged in the mining of silver; in the manufacture, sale and installation of coated steel, aluminum and wood fences through a subsidiary; in the manufacture of piezo electric crystals and crystal filters through a division; and in the manufacture of metal cabinets and accessories for the electronics industry and as a partner in various oil and gas leases. (Appendix, p. 40) Sunshine Mining Company was not and is not engaged in the business of insurance.

(2) The Brief of NAIC presents only a single issue, *i.e.*, whether Congress, in enacting the Williams Act amendments to the Securities Exchange Act of 1934, preempted the states from regulating corporate tender offers in a different manner.

That preemption issue has already been fully and adequately presented to the Court by the Brief of Appellants. (Appellants' Brief, pp. 66-84)

That preemption doctrine is further explored in the *Amicus Curiae* Briefs submitted by the states of Utah, Massachusetts and New York (in which 14 other states have joined).

(3) The real issue in which NAIC is interested is whether the 1970 amendments to the Williams Act provisions of the Securities Exchange Act of 1934, which brought within the scope of that Act the regulation of tender offers for equity securities of insurance companies, preempts state insurance holding company laws. That issue is currently pending in the United States District Court, Eastern District of Louisiana, *Roussel v. Boren*, No. 78-2345 (E.D.La.).

The *Roussel* preemption issue involves different historical and statutory considerations than are involved in this case. For example, after *Paul v. Virginia*, 75 U.S. (8 Wall) 168 (1869), the regulation of insurance transactions was thought to rest exclusively with the states. *SEC v. National Securities, Inc.*, 393 U.S. 453, 458 (1969). In *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944), however, this Court held that insurance transactions were subject to federal regulation under the Commerce Clause, and that the antitrust laws, in particular, were applicable to them. Congress quickly reacted with the enactment of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, reflecting Congress' broad support of the existing and future state systems for regulating and taxing the business of insurance. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 409 (1946). Section 2(b) of the McCarran-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . ."

In *SEC v. National Securities, Inc., supra*, an Arizona statute aimed at protecting the interests of those who owned stock in an insurance company was found not to come within the sweep of the McCarran-Ferguson Act, since the Arizona statute was not a state attempt to regulate the "business of insurance" as that phrase was used in the Act. It was in fact an attempt to regulate the *securities* of insurance companies, not the business of insurance itself. Accordingly, the McCarran-Ferguson Act was held to present no barrier to the application of federal securities laws. The *Roussel* court may be called upon to determine whether state insurance holding company laws regulating tender

offers for securities of insurance companies constitute state attempts to regulate the "business of insurance" rather than the securities of insurance companies and thereby fall within the sweep of the McCarran-Ferguson Act. That is not an issue before this Court in this case.

In arguing against federal preemption of state insurance holding company laws, NAIC may find some comfort in other examples of Congressional deference to state regulation of insurance companies. Section 3(a) (10) of the Securities Act of 1933 allows insurance commissioners to regulate the terms and conditions of the exchange of the securities of insurance companies under certain circumstances. 15 U.S.C. § 77c(a) (10). Section 12(g) (2) (G) of the Securities Exchange Act of 1934 exempts securities issued by insurance companies from the registration requirements of Section 12(g) if the insurance company is regulated by its state of incorporation in all three of the following areas:

> (i) It is required to and does file annual reports with a state official or agency substantially in accordance with the requirements prescribed by NAIC;
>
> (ii) It is regulated in the solicitation of proxies in accordance with the requirements prescribed by NAIC; and
>
> (iii) After July 1, 1966, the purchase and sale of securities issued by the insurance company by beneficial owners, directors or officers of the company are subject to regulations substantially in the manner provided in § 16 of the Exchange Act relating to the reporting of and trading in securities of their companies by insiders.

15 U.S.C. § 78-1(g) (2) (G). NAIC has advised the Securities and Exchange Commission that a uniform annual reporting form prescribed by the NAIC has been adopted in

every state and in the District of Columbia; the insurance agencies in every state and the District of Columbia have adopted rules and regulations to comply with the proxy solicitation requirements substantially equivalent to what the Commission would require under its rules; and that all of the states and the District of Columbia have adopted insider trading legislation affording investor protections comparable to those of § 16 of the Exchange Act. (SEC 32nd Annual Report [1966] p. 13) CCH Fed.Sec.L.Rep. ¶ 23,301.05. This case involves none of those considerations, each of which is far beyond the scope of this appeal.

CONCLUSION

For the foregoing reasons, Appellee respectfully submits that the Motion of NAIC for Leave to File a Brief *Amicus Curiae* should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Objection of Appellee to Motion of National Association of Insurance Commissioners for Leave to File Brief *Amicus Curiae* were mailed by depositing the same in a United States mailbox, with airmail postage prepaid, addressed to each of the following counsel of record, this 21st day of March, 1979.

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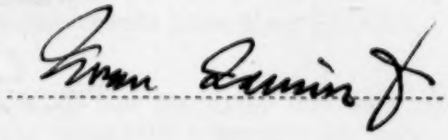

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IN THE

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October Term, 1978

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Appellants,

vs.

GREAT WESTERN UNITED CORPORATION,

Appellee.

BRIEF OF THE STATE OF INDIANA AMICUS CURIAE IN SUPPORT OF APPELLANTS

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BRIEF OF THE STATE OF INDIANA AMICUS CURIAE IN SUPPORT OF APPELLANTS

The State of Indiana, by Theodore L. Sendak, Attorney General of Indiana, Donald P. Bogard, Chief Counsel, and William G. Mundy, Assistant Attorney General, submits its *amicus curiae* brief in support of the Appellants in the above-entitled cause, pursuant to Rule 42(4) of the Rules of the Supreme Court.

STATEMENT OF THE CASE

The *amicus* accepts and adopts the "Statement of the Case" contained in Appellants' Jurisdictional Statement at pages 8-12.

INTEREST OF THE AMICUS

This brief submitted *amicus curiae* by the State of Indiana will only address the issue of the jurisdiction of the federal district court in this action. Indiana believes that this case reflects an alarming tendency on the part of federal district courts to entertain jurisdiction over any controversy, regardless of where such controversy arises. Such practice has required the State of Indiana, as the District Court below required the State of Idaho, to defend two (2) lawsuits in Texas, well beyond the confines of Indiana's border.

In *Rodriguez v. Marshall,* Civil Action Number 73-B-130, the United States District Court for the Southern District of Texas, Brownsville Division, on December 31, 1975, dismissed Indiana officials from a pending lawsuit, but not until the State's motion had been under advisement for over two years and attorneys for Indiana had made several trips to Texas. A case entitled *Ramiro Rivera, et al. v. Ray Marshall, etc., et al.,* Civil Number B-77-115, was filed in the same court on April 26, 1977, service was made upon the Indiana officials on October 24, 1978, and the State's Motion to Dismiss is pending.

Indiana is also vitally interested in this appeal since the same reasoning embraced by the United States Court of Appeals for the Fifth Circuit (hereafter Fifth Circuit) in finding that jurisdiction existed over Idaho officials would appear to apply with equal force to Indiana officials in performing their duties under this State's takeover laws. Indiana Code §§ 23-2-3-1 *et seq.* Indeed, Indiana is one of twenty-nine states which have enacted such legislation.

Moreover, numerous Indiana officials who engage in the exercise of state regulatory functions will be susceptible

to *in personam* jurisdiction throughout this country if the decision of the Fifth Circuit, which will no doubt be expanded upon by the district courts in the absence of guidance by this Court, is allowed to stand.

With the ever increasing number of lawsuits facing state governments today, it is imperative that states' attorneys not be compelled to defend such lawsuits all across the nation in any district court that attempts to find jurisdiction.

ARGUMENT

I.

NO PERSONAL JURISDICTION EXISTED OVER THE IDAHO STATE OFFICIALS

The Fifth Circuit conceded that "[b]ecause this suit was brought in Texas, not Idaho, the case . . . raises novel questions of jurisdiction and venue." *Great Western United Corp. v. Kidwell,* 577 F.2d 1256, 1261 (5th Cir. 1978) (hereafter *Kidwell*). It is submitted that the Fifth Circuit's responses to these novel questions were clearly erroneous.

A

The Fifth Circuit Has Unjustifiably Expanded the Fiction Present In *Ex Parte Young*

In *Ex Parte Young,* 209 U.S. 123 (1908), this Court engaged in the fiction that since a state is incapable of authorizing an unconstitutional act, a state would have no interest in a suit alleging that a state official is acting in an unconstitutional manner. 209 U.S. at 159. By engaging in this fiction, the proscriptions of the Eleventh Amendment were avoided by stripping the official of his official character.

By expanding on this Court's reasoning in *Ex Parte Young*, the Fifth Circuit has carried the fiction to its most illogical implication, stating, in *Kidwell*, 577 F.2d at 1265:

> We read *Young* to say that a state official in enforcing an unconstitutional statute is an individual defendant and nothing more. . . .

From that reasoning it would follow that a state would have no interest in defending actions of a state official alleged to be unconstitutional, in any federal forum, regardless of whether that federal forum is in the official's own state or any other state in the nation.

There comes a point when the decision in *Ex Parte Young* must be recognized for what it is—a fiction and nothing more. Obviously, Idaho, Indiana, and all other states of this Union have a strong and vital interest in preserving the constitutionality of their state's laws. This Court would do a great disservice to the States were it to blind itself to the reality of the situation as a result of a fiction which has now turned to fantasy. The necessary fiction of *Ex Parte Young* becomes totally unnecessary as utilized in the context of this action. The Appellee was certainly free to contest the validity of Idaho's takeover statute in an Idaho federal or state court. Instead, it compelled Idaho officials to go to Texas and assert their defense in a federal court there. Legal fictions should only be utilized when necessary. The *amicus* would submit that *Ex Parte Young* strips a state official of sovereign immunity for Eleventh Amendment purposes only within his own state.

B.

The Texas Long Arm Statute Does Not Provide Personal Jurisdiction Over the Idaho State Officials

This Court has on no less than two occasions specifically admonished state courts that the Court's flexible standard of *in personam* jurisdiction as enunciated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) does not "herald the eventual demise of all restrictions on the personal jurisdiction of state courts." *Hanson v. Denckla*, 357 U.S. 235, 251 (1958); *Kulko v. Superior Court of California*, 436 U.S. 84 (1978). The *amicus* would submit that the time has now come for this Court to reacquaint inferior federal courts with their jurisdictional limitations as well.

Personal jurisdiction over the Idaho state officials in this case was premised upon Federal Rules of Civil Procedure 4(d)(7) and 4(e). Those rules allow personal jurisdiction to be obtained through the "long arm" statute of the forum state. The Texas long arm statute, Tex. Rev. Civ. Stat. Ann. art. 2031 b, § 4, authorizes assertion of personal jurisdiction over nonresidents to the limits of due process. *Jetco Electronic Industries, Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973).

The boundaries of due process requirements of *in personam* jurisdiction have been explored by this Court beginning in *International Shoe Co. v. Washington, supra.* The constitutional standard as enunciated in that case provides that in order for a state to enter a binding judgment against a nonresident defendant, such defendant must "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Inter-*

national Shoe Co. v. Washington, supra, 326 U.S. at 316, quoting *Milliken v. Meyer,* 311 U.S. 457, 463 (1940). An examination of the Fifth Circuit's decision in light of *International Shoe* and its progeny will be explored below.

In *Hanson v. Denckla, supra,* 357 U.S. at 253, this Court observed that:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum State . . .

The Idaho officials performed no acts which could arguably be said to demonstrate that they had purposefully availed themselves of the privilege of conducting activities within Texas. To the contrary, the sole action by an Idaho official consisted of writing a letter to Great Western advising it that there were deficiencies in the corporation's disclosure made under the Idaho takeover statute. This letter was in response to Great Western's voluntary filing with the Idaho official. Thus, the sole activity present in this case was a letter written by an Idaho official, in Idaho, concerning Idaho law in response to documents filed by a Delaware corporation whose principal executive offices were located in Texas.

The Fifth Circuit's response to the *Hanson v. Denckla,* requirement that a defendant must have purposefully availed himself of the benefits and protection of the forum's law is something less than satisfying. First, the Fifth Circuit states that the benefits and protection language "should not be read too literally." *Kidwell, supra,* 517 F.2d at 1268, quoting, *Product Promotions, Inc. v. Cousteau,*

495 F.2d 483, 496 (5th Cir. 1973). This Court has never intimated that this langauge is surplusage or is not to be understood to mean what it says. Second, the Fifth Circuit found that, in any event, the *Hanson v. Denckla* requirement was satisfied, speculating that if "the Idaho officials had obtained criminal sanctions [under the Idaho act against Great Western], no doubt the state officials would have expected Texas to honor those criminal judgments." *Kidwell, supra,* 577 F.2d at 1269. Judge Gobald, in dissent, notes that such a "wispy possibility" should not be treated as a jurisdictional factor. 577 F.2d at 1289, note 3. The *amicus* fully concurs in the dissent's remarks and would further note that even if Idaho, or any other state for that matter, seeks assistance from a sister state in seeing that the state's criminal statutes are enforced, such a request for assistance hardly connotes of seeking the benefits and protection of the sister state's laws.

Having seemingly rejected this Court's dictates as enunciated in *Hanson v. Denckla,* the Fifth Circuit adopts a test, although not fully articulated, that provides whenever a defendant's activities in other forums have foreseeable effects in the forum state the minimum contacts test will have been met. 577 F.2d at 1266-1267.

In *Kulko v. Superior Court of California, supra,* this Court rejected the California Supreme Court's reliance upon an "effects" test. This Court noted there that the "effects" test was derived from the American Law Institute's Restatement (Second) of Conflicts § 37 (1971), and stated that "this provision is not binding on this Court, [and] does not in any event support the decision below." 436 U.S. at 96. As was true with the appellant in *Kulko,* the Idaho state officials visited neither physical injury on

either persons or property in the forum state nor did they engage in commercial activity. Rather, the Idaho officials' sole "effect-causing" actions were state regulatory actions.

The Fifth Circuit attempts to limit its decision to the facts of the case due to what it views as the uniqueness of state takeover laws. As ably noted by the dissent, the majority opinion's reliance upon the unique nature of state takeover statutes anticipates the Commerce Clause holding of the court. 577 F.2d at 1291-1292. It is wholly unclear to the *amicus,* however, that the Fifth Circuit limits its finding of *in personam* jurisdiction to the facts involved in the case, for it is obvious that if the court's "foreseeable effects" test is given the broad reading that it can and no doubt will be given, numerous state officials who are mandated under state law to enforce regulations which clearly have foreseeable effects in other forums will be subjected to suit throughout this country. The resulting drain upon state treasuries and personnel will be more than just inconvenient, it will be wholly unreasonable. The *amicus* would accordingly urge the Court to reject the Fifth Circuit's analysis that state regulatory activities of state officials, which activities have foreseeable effects in other forums, provide sufficient minimum contacts with those forums so as to make such officials amenable to suits in the foreign jurisdictions without offending due process.

C.

Enforcement of a State Statute Alleged to be Preempted by the Securities Exchange Act of 1934 Does Not Constitute a Violation of the Act

A second, and independent, basis for jurisdiction found to exist by the Fifth Circuit was based upon Section 27 of

the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1970). That statute provides in pertinent part:

> Any criminal proceeding [under the Act] may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

The Fifth Circuit held, *Kidwell, supra,* 577 F.2d at 1271, that jurisdiction against the Idaho officials could be premised upon Section 27 since the act "impliedly prohibits a state official from enforcing a statute that conflicts with the 1934 Act." The "violation" which was found to exist by the Fifth Circuit, thus invoking the jurisdictional and venue provisions of Section 27, was based upon the court's strained reading of Section 28 of the 1934 Act, 15 U.S.C. § 78(bb) (1970), which provides:

> Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

The only purpose of the statute appears to be to reserve to the States the power to regulate securities. It is ironic that the Fifth Circuit attaches to the statute an affirmative duty, a violation of which becomes actionable, on the part of state officials to refrain from regulating activity which

conflicts with the provisions of the 1934 Act. There is absolutely nothing in the legislative history or in the language of Section 28 to suggest that an actionable claim is made against state officials when it is alleged that they are enforcing state regulatory schemes in conflict with the 1934 Act. Indeed, Section 28 by its terms prohibits nothing, and the history of the 1934 Act reflects that the purpose of Section 27 was to grant access to a local court for a plaintiff claiming to be the victim of an interstate securities *fraud*. No fraud on the part of the Idaho official was, or could have been, alleged in this action.

Thus, the new action created by the Fifth Circuit has absolutely no support in case law or legislative history, and the *amicus* would submit that the Fifth Circuit's analysis of the 1934 Act appears to be merely an attempt by the Court to bootstrap an unconvincing finding of personal jurisdiction under the Texas long arm statute.

CONCLUSION

For the foregoing reasons, the *Amicus*, State of Indiana, respectfully urges that this Court reverse and vacate the decision of the Fifth Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-759

WAYNE L. KIDWELL, et al,

Appellants,

v.

GREAT WESTERN UNITED CORPORATION,

Appellee.

AMICUS CURIAE BRIEF OF THE STATE OF UTAH

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AMICUS CURIAE BRIEF OF THE STATE OF UTAH

INTEREST OF THE STATE OF UTAH

The State of Utah is interested in the disposition of this case because Utah has a state take-over offer disclosure act similar to the Idaho statute which is under attack. Utah Code Ann. §§ 61-4-1 to 13 (Supp. 1977). Futhermore, the case presents questions which, if resolved favorably to appellee (Great Western), threaten to substantially impact upon and diminish the ability of the State of Utah to administer not only its take-over offer disclosure act, but all its laws.

This amicus will restate only such facts of the case as are necessary in the text of its argument.

SUMMARY OF ARGUMENT

1. The District Court did not have diversity jurisdiction since a state is not a citizen for purposes of such jurisdiction. The Idaho state officials acted only as the arm or alter ego of the state, and were not citizens of the state for purposes of diversity jurisdiction.

2. The District Court did not have jurisdiction under 28 U.S.C. § 1337 since the Securities Exchange Act of 1934 is not an act regulating commerce.

3. The District Court did not have jurisdiction under the Securities Exchange Act of 1934 since the Idaho officials did not violate that Act by merely enforcing the Idaho take-over statute.

4. Even if the Idaho officials are treated as private defendants, they have not been accorded the due process protection, as non-residents, which the Constitution requires. The fact that some of the impacts of the officials' actions in Idaho were felt in Texas is not sufficient to support a finding that the officials purposefully availed themselves of the privilege of conducting activities within Texas. Further, there were no acts or occurrences which constitute sufficient minimum contacts with Texas to support long-arm jurisdiction under the current holdings of this Court. The decisions of the lower courts in this case have created a new basis for jurisdiction over non-resident state officials which would

subject countless state statutes and officials to attacks in distant federal courts. This expanded basis for jurisdiction does not meet the due process standards of the Constitution.

5. The Securities Exchange Act of 1934 does not support venue in the Northern District of Texas since none of the Idaho officials is found in or is an inhabitant of that district, none of the officials transacted business in that district, and the alleged violation did not occur there.

6. 28 U.S.C. § 1391(b) does not support venue in the Northern District of Texas since the claim in this action arose in Idaho, not Texas. A weighing of contacts analysis shows clearly that the claim arose in Idaho.

7. Under the doctrines of abstention, comity and federalism, the federal courts should have declined to hear this case, and should now stay the proceedings pending a state adjudication of the issues. The Idaho statute in question is a new enactment which has not yet been construed by the courts of Idaho. State court construction of the statute might well obviate or modify the federal constitutional issues.

8. The Idaho statute is not pre-empted by the federal Williams Act. Congress has evidenced a positive intent to allow dual regulation of corporate take-over offers by both state and federal authorities. Further, the Idaho statute and the other 31 similar state statutes do not create an obstacle to the accomplishment of the

purposes of the Williams Act. Stake take-over statutes supplement the Williams Act, and do not conflict with it.

ARGUMENT

I. *THE DISTRICT COURT DID NOT HAVE SUBJECT MATTER JURISDICTION UNDER 28 U.S.C. § 1332 OR 28 U.S.C. § 1337.*

A. JURISDICTION DOES NOT EXIST UNDER 28 U.S.C. § 1332 (DIVERSITY CASES).

Subject matter jurisdiction is not proper under 28 U.S.C. § 1332 since a state is not a citizen for purposes of diversity jurisdiction. *Postal Telegraph Cable Company v. Alabama*, 155 U.S. 482 (1894); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

Generally, a suit against a state agency and/or its officers is considered to be against the state itself unless the agency is "endowed with such a separate and distinct existence as that its activities are not those of the state [sic]." *Craig v. Southern Natural Gas Company*, 125 F.2d 66, 67 (5th Cir. 1942). In *State Highway Commission of Wyoming v. Utah Construction Co.*, 278 U.S. 194 (1929) for example, the Court noted that since the state was acting through its officers, its officers were but the arm or alter ego of the state. The officers

were therefore not "citizens of the state" for purposes of diversity jurisdiction.

Factors used to determine whether or not a state agency has a "separate and distinct existence" include the capacity of the agency to sue and to be sued, the financial connection between the agency and the state, the performance of an essential government function by the agency and the corporate status or lack thereof of the agency. 6 A.L.R. Fed. 615. Two factors have been identified as being of primary importance, namely, performance of a governmental function and the financial connection between the agency and the state. *Idaho Potato Commission v. Washington Potato Commission*, 410 F. Supp. 141 (D. Idaho 1975).

The Idaho Department of Finance is endowed with the broad powers to regulate the sale and purchase of securities. There is little doubt that regulation of securities is considered to be a governmental function. Under the tests laid down in *Idaho Potato, supra*, it appears that the Director of the Department of Finance is a mere arm or alter ego of the state and as such cannot be considered to be an individual citizen under 28 U.S.C. § 1332.

It is clear that the named individual defendants in this action are being sued in their official capacities and that no claims have been personally made against them. Defendant McEldowney is acting solely for and on behalf of the Idaho Department of Finance and defendant Kidwell is acting for Idaho solely as its Attorney

General. It is clear that the defendants are simply alter egos for the State of Idaho and are not individual citizens for purposes of diversity jurisdiction.

B. JURISDICTION DOES NOT EXIST UNDER 28 U.S.C. § 1337 (CASES BASED ON ACTS REGULATING COMMERCE).

28 U.S.C. § 1337 provides that:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any *Act of Congress* regulating commerce or protecting trade and commerce against restraint and monopolies. (Emphasis added.)

As discussed in Part II, below, subject matter jurisdiction cannot be predicated upon this statute since plaintiff does not have a cause of action under the Securities Exchange Act of 1934, and therefore has not alleged an action arising under an "Act of Congress regulating commerce." *Russo v. Kirby*, 453 F.2d 548 (2d Cir. 1971) ("Jurisdiction under § 1337 does not attach on the bare assertion that a right under an act regulating commerce is infringed. Facts must be alleged to show that federal law in the particular case creates a duty or remedy.")

Further, to the extent that this action is based upon the alleged unconstitutionality of the Idaho statute, the action does not arise under an "Act of Congress."

II. *THE DISTRICT COURT DID NOT HAVE IN PERSONAM JURISDICTION UNDER THE SECURITIES EXCHANGE ACT OF 1934 OR PURSUANT TO EX PARTE YOUNG.*

A. JURISDICTION DOES NOT EXIST UNDER THE SECURITIES EXCHANGE ACT.

In order to invoke the jurisdictional provisions of Section 27 of the Securities Exchange Act (15 U.S.C. § 78a et. seq. (1970)) so as to effect extra-territorial service of process, a plaintiff must establish a prima facie cause of action under the Act. *Bell v. Hood*, 327 U.S. 678 (1945). Great Western and the Circuit Court have attempted to bootstrap this case into the sphere of the Act, thereby invoking its jurisdictional provisions, by alleging that the Idaho tender-offer statute is preempted by and conflicts with the Act, resulting in a "violation" of the Act. The Circuit Court has misconstrued the purposes of both Sections 27 and 28 in a convoluted attempt to base jurisdiction upon the statute.

The purpose of Section 27 is to afford a remedy for violations of the substantive provisions of the Act. In the tender-offer context these provisions have to do with disclosures, material misstatements or omissions, and fraudulent or manipulative acts. See, e.g. *Hooper v. Mountain States Securities Corp.*, 282 F.2d 195 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961). No such violation is alleged here.

Section 28 of the Act provides only that state laws which do not conflict with the Act are permitted. To posit a substantive "violation" of the Act upon the mere existence of a state statute which may or may not conflict with the Act, rather than upon a failure to disclose, a material misstatement, or a fraudulent act, totally misconstrues the relationship between and the purposes of Sections 27 and 28. There is absolutely no authority for the Circuit Court's interpretation and assertion of jurisdiction under the Act. If jurisdiction exists, it is under the Supremacy Clause of the Constitution, not under Sections 27 and 28 of the Securities Exchange Act.

B. JURISDICTION DOES NOT EXIST UNDER EX PARTE YOUNG

The Circuit Court, in interpreting *Ex parte Young*, 209 U.S. 123 (1908), held in effect that a state official who carries out his statutory duties acts as an individual, not as a state official. The state allegedly then has no interest in any resulting lawsuit. This is of course an extreme example of a legal fiction, as the Circuit Court admits. The Idaho Director of Finance was obviously acting solely in his official capacity vis-a-vis the Great Western tender offer. *Ex parte Young* held merely that a Minnesota state official was subject to suit in the Minnesota federal court. No question of personal jurisdiction was ever presented. *Ex parte Young* does *not* hold that a state official is subject to suit as an individual defendant in the federal court of a different state. The Circuit Court has, however, given the case that broad and unwarranted interpretation.

III. *THE DISTRICT COURT DID NOT HAVE JURISDICTION UNDER THE TEXAS LONG-ARM STATUTE.*

Even if the Idaho officials are treated as private defendants, they have not been accorded the due process protection, as non-residents, which the Constitution requires. The due process standards for the assertion of jurisdiction over non-residents are set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), *McGee v. International Insurance Co.*, 355 U.S. 220 (1957), and *Hanson v. Denckla*, 357 U.S. 235 (1958). Due process requires both (1) some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, and (2) the presence of sufficient minimum contacts that the maintenance of the suit does not offend traditional notions of fair play and justice.

The Circuit Court, while alleging that the first part of this test is really not very important, states that the test is met because the "activities" of the Idaho officials within Texas were "to regulate tender offers." In other words, since the *impact* of the regulation was felt in Texas, the Idaho *activity* (regulation of tender offers) occurred in Texas, not Idaho. As the Circuit Court stated it: "The *impact* of their regulation was felt in Texas, as they intended it to be. Thus, they did conduct *activities* in Texas." If this is now the test for jurisdiction over non-resident state officials, there may as well be no test at all since almost every state regulation will have an impact in other states.

The Circuit Court uses similar reasoning to conclude that the Constitutionally required "minimum contacts" are present due to the fact that the Idaho statute "amounted to the regulation of Great-Western's Texas-based activities." No other contacts with Texas are enumerated, since there are none. The Circuit Court has in effect created a new basis for jurisdiction which goes far beyond current holdings.

The Circuit Court attempts to justify its jurisdictional holding by drawing a distinction between, and asserting the unique character of state take-over statutes vis-a-vis other portions of state Blue Sky statutes and other state statutes generally. The Court in effect says that the extra-territorial *impact* of the take-over statute is unique because the statute has no relation to the in-state *transaction* which it is meant to regulate. Since the Court was attempting to show that the impact of the statute was what makes it unique, the Court should have examined that impact. In fact, the extra-territorial impact of the take-over statute is no more nor less than the extra-territorial impact of many other state statutes. Affirmation of the Circuit Court's expanded "impact" or "effect" test of due process would greatly expand present due process standards and would subject countless other state statutes to attack in out-of-state federal courts.

IV. *VENUE IS NOT PROPER IN THE NORTHERN DISTRICT OF TEXAS.*

A. THE SECURITIES EXCHANGE ACT DOES NOT SUPPORT VENUE.

The discussion above regarding jurisdiction under the Securities Exchange Act applies equally to the issue of venue. There was no substantive violation of the Act under Section 27.

Venue as provided under Section 27 is as follows:

> Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business. . . .

Venue is not proper in the Northern District of Texas because none of the defendants is found in or is an inhabitant of that district, none of the defendants transact business in the District, nor did the alleged violation occur there.

A Defendant "transacts business" in a district within the meaning of Section 27 "only when, among other things, its activities within the district constitute a 'substantial part' of its 'ordinary business'." *Gilson v. Pittsburgh Forgings Co.*, 284 F. Supp. 569, 570 (S.D.N.Y. 1968).

In interpreting the venue provisions of the anti-trust laws, which are analogous to those of the securities laws, the Supreme Court has held that the words "transacts business" mean "[t]he practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character.'" *U.S. v. Scophony Corp.*, 333 U.S. 795, 807 (1943).

There is no basis for finding that defendants "transacted business" in the Northern District of Texas within the meaning of that term as employed in Section 27.

The alleged "violation" of Section 27 did not occur in the Northern District of Texas either. In order to qualify a district as a proper forum in an action premised on a violation of the 1934 Act, a plaintiff must show that there occurred in that district an act "which represents more than an immaterial part of the allegedly illegal events." *Dopp v. American Electronic Laboratories, Inc.*, 55 F.R.D. 151, 155 (S.D.N.Y. 1972).

Some affirmative act which occurred within the forum district and which constituted an integral part of the "violation", is necessary to support jurisdiction. The present defendants undertook no affirmative acts in the Northern District of Texas. The alleged "violations" of which the plaintiff complains are merely manifestations of acts by the defendants in other districts.

B. 28 U.S.C. § 1391(b) DOES NOT SUPPORT VENUE.

The Circuit Court notes that under the "expansive" interpretation of 28 U.S.C. § 1391(b), proper venue is equal to the availability of compulsory process. The problem with this is that only "minimum contacts" are necessary to satisfy the compulsory process requirements. An action can have "minimum contacts" with many states at the same time sufficient to support compulsory process, but that does not mean that venue is proper in each of those states. The better test for determining where venue lies involves the balancing and weighing of contacts.

Paramount in this weighing process is the fact that the statute being interpreted is an Idaho statute. Further, all the acts of the state officials which are being complained of took place in Idaho. Great Western made its initial voluntary tender-offer filing in Idaho in compliance with the Idaho statute. All the *acts* or *occurrences* giving rise to the cause of action occurred in Idaho. Only the *impacts* of those acts were felt in Texas, and Texas is only one of many jurisdictions in which those impacts were felt. A weighing of contacts analysis should be much more concerned with the nexus of the acts giving rise to the cause of action, and not the multiple nexi of all the varying impacts of those acts.

The interest of the forum is also relevant in weighing contacts. The Idaho courts have a more substantial relationship to the Idaho statute and to the officials who attempted to enforce it, i.e., to the *acts* and *occurrences* which gave rise to the cause of action.

Under the appropriate weighing of contacts analysis, proper venue lies only in Idaho, not in Texas.

V. *THE DOCTRINE OF ABSTENTION AND PRINCIPLES OF COMITY AND FEDERALISM REQUIRE THE FEDERAL COURTS TO DECLINE FROM DECIDING THE SUBSTANTIVE ISSUES OF THIS CASE.*

The Fifth Circuit has held that in order for a federal court to interfere in state judicial proceedings, irreparable harm must be threatened for which an adequate state remedy does not exist. *Duke v. Texas*, 477 F.2d 244 (5th Cir. 1973). Federal courts should abstain especially when state courts have not had the opportunity to address the constitutionality of their own statutes and when constitutional issues might be avoided by state interpretation of unsettled questions of state law. *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

In *Bellotti v. Baird*, 428 U.S. 132 (1976), the Court said:

> As we have held on numerous occasions, abstention is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary "which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." Harrison v. NAACP, 360 U.S. 167, 177, 3 L. Ed.2d 1152, 79 S. Ct. 1025 (1959). See also Colorado River Cons. Dist. v. United States, 424 U.S. 800, 813-814, 47 L. Ed.2d 483, 96 S. Ct. 1236 (1976); Carey v. Sugar, 425 U.S. 73, 78-79, 47 L. Ed.2d 587, 96 S. Ct. 1208 (1976); Kusper v. Pontikes, 414 U.S. 51, 54-55, 38 L. Ed.2d 260, 94 S. Ct. 303 (1973); Lake Carriers' Assn. v. MacMullen, 406 U.S. at 510-511, 32 L. Ed.2d 257, 92 S. Ct. 1749; Zwickler v. Koota, 389 U.S. 241, 249, 19 L. Ed. 2d 444, 88 S. Ct. 391 (1967); Railroad Comm'n v. Pullman Co. 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941).

Although abstention is in the discretion of the court, the Supreme Court has not applied an "abuse of discretion" standard on review, but has rigorously applied the elements of the *Pullman* abstention doctrine. See *e.g. Bellotti v. Baird, supra*, and *Askew v. Hargrave*, 401 U.S. 476, 478 (1971). Thus, in deciding whether it must stay its own proceeding, a federal court must determine (1) whether the state law at issue is uncertain or unclear, and if it is, whether a state court construction of the statute will obviate or modify the federal constitutional issues, and (2) the effect of the delay and expense on the individual plaintiffs attendant with the application of the abstention doctrine.

There exist valid state issues upon which this action might be resolved. The Idaho tender-offer statute is a new enactment which has not yet been interpreted or construed by the courts ofIdaho. A number of state law issues should properly be decided by the Idaho courts. For example, an issue exists as to the purpose of the statute. The District and Circuit courts inappropriately took upon themselves the burden of determining the purpose of Idaho's take-over statute when no legislative purpose was stated. Such a determination should be made by a state court. By allowing the Idaho state courts to hear the pending case this Court may avoid a decision on constitutional grounds and minimize the conflict between the federal and state judicial systems.

An adequate remedy may have existed under state law, but Great Western never even attempted to ex-

haust its state administrative or judicial remedies. Instead, it went to a distant lower federal court for a tentative interpretation which might be displaced at any time by a definitive state court decision.

Great Western will suffer no undue delay, inconvenience, or expense if this Court stays this proceeding pending adjudication in state court. Numerous tender-offer offerors have had to comply with similar statutes in other states, and to cope with the attendant delays, without being irreparably harmed. Furthermore, as noted by the Circuit Court, the tender-offer has in fact already been consummated by negotiations between Great Western and Sunshine Mining and Metal Company.

This Court should stay the federal proceedings until Idaho's courts have had the opportunity to consider the many important issues presented.

VI. *THE IDAHO STATUTE IS NOT PREEMPTED BY THE WILLIAMS ACT*

Section 28 of the Securities Exchange Act of 1934 explicity recognizes the validity of state take-over statutes. At the time of the enactment of the Williams Act in 1968 there was in effect in Virginia a state Blue Sky statute regulating take-over offers and requiring registration of any take-over offer with state regulatory authorities. *See Code of Virginia*, § 13.1-528 *et seq.* Additionally, when Congress again amended the 1934 Act in 1970 and 1975, there were additional take-over

statutes in effect in various states. These various state statutes, like Idaho's, require registration of take-over offers with state securities authorities. Congress did not see fit in either 1970 or 1975 to include within the amendments to the 1934 Act any provision pre-empting state regulatory activity. Thus, Congress has evidenced a positive intent that there should be dual regulation of take-over offers by both state and federal regulatory authorities. Furthermore, there are now 32 states with take-over statutes, and Congress has still not seen fit to amend the Securities Exchange Act to pre-empt the regulation of take-overs by the states.

As the Supreme Court said in *Merrill, Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117 (1973):

> Where the Government has provided for collaboration the courts should not find conflict.

Since the federal securities laws and Idaho's Blue Sky laws, including its take-over statute, are not clearly in conflict, examination must center upon whether the Idaho law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52 (1940).

The purposes and objectives of Congress in enacting the Williams Act were to protect investors by requiring full disclosure and by prohibiting deceptive practices. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1970). As the Circuit Court notes, Congress took a "market approach" to accomplish its purposes.

The Idaho statutory scheme also protects investors. Its requirements and delays are arguably more burdensome upon offerors, but investors ultimately benefit therefrom.

Ohio's experience with its take-over statute is especially instructive. Ohio's *Amicus* brief before the Circuit Court is replete with examples of how that state's take-over statute has benefitted investors by insuring that they have sufficient time and information to intelligently decide whether to accept an offer, and by allowing sufficient time for the making of competing offers at higher prices. Experience under the Ohio statute clearly shows that the statute does not prevent tender offers or make local corporations tender-offer proof. The statute, in fact, merely supplements, and does not conflict with the market approach of the Williams Act.

Although, as noted by the Circuit Court, Congress may have chosen to reject certain statutory requirements which might delay the consummation of tender offers, this should not preempt state legislatures from enacting provisions which are absent from the federal legislation and which might cause certain delays, as long as the state statutes do not obstruct the overall purposes of the federal legislation.

The Circuit Court expressed special objections to specific sections of Idaho's take-over statute, such as the provision by which a target company's board of directors has the power to exclude an offer from certain state

regulations. If specific sections of the statute are in fact in conflict with the purposes of the Williams Act, that does not mean that the entire statute should be invalidated. States admittedly have a legitimate interest in insuring that tender offers provide sufficient disclosure and are otherwise fair, and those portions of the state law which properly address these interests and which are not in conflict with the purposes of the Williams Act should be allowed to stand.

State take-over statutes and the Williams Act both take the "market approach" to investor protection, although utilizing slightly different requirements. These differences in approach should not be determinative of the pre-emption issue. The test is whether the state statutes create an obstacle to the accomplishment of the federal purpose. State take-over statutes do not create such an obstacle to, but are merely another means of accomplishing, the purposes of the Williams Act.

CONCLUSION

The assertion of jurisdiction and venue by the District Court for the Northern District of Texas over the defendant Idaho state officials was improper, and should be reversed. The District Court should be ordered to vacate its opinion and dismiss the case. In the alternative, this Court should hold that the Idaho corporation take-over statute is not preempted by the federal Williams Act.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term 1978

No 78-759

DAVID H. LEROY, Attorney General of Idaho,
and TOM D. McELDOWNEY,
Director of the Department of Finance
of the State of Idaho,
Appellants,

vs.

GREAT WESTERN UNITED CORPORATION,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF OHIO

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In The

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October Term 1978

No. 78-759

DAVID H. LEROY, Attorney General of Idaho,
and TOM D. McELDOWNEY,
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Appellants,

vs.

GREAT WESTERN UNITED CORPORATION,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTION

This Amicus Curiae Brief of the State of Ohio is submitted by the Attorney General of Ohio pursuant to the provisions of Rule 42(4) of the Rules of Practice of the Supreme Court of the United States. It is submitted in support of the position of the State of Idaho and its officials, David H. Leroy, Attorney General of Idaho, and Tom D. McEldowney, Director of the Department of Finance of the State of Idaho.

STATEMENT OF POSITION AND SUMMARY OF ARGUMENT

On August 10, 1978 the United States Court of Appeals for the Fifth Circuit determined that the Idaho Corporate Takeover Law, Idaho Code §§ 30-1501 to 30-1513, was preempted by supremacy clause of United States Constitution, Art. 6c1.2 because the Idaho statute conflicted with the federal scheme for the regulation of corporate tender offers embodied in the Williams Act amendments to the 1934 Securities Exchange Act, 15 U.S.C. §§ 78m (d, e) and 78n (d-f). The Fifth Circuit also determined that the Idaho statute imposed constitutionally invalid burdens upon interstate commerce pursuant to the commerce clause of the United States Constitution, Article 1, § 8, cl. 3. Personal jurisdiction over the Idaho officials was determined to be appropriate in the United States District Court for the Northern District of Texas upon either the Texas long arm statute, Tex. Civ. Stat. Ann. art. 2031(b) or § 27 of the 1934 Securities Exchange Act, 15 U.S.C. § 78aa (1976). Venue was affirmed pursuant to § 27 and the general venue provisions of 28 U.S.C. § 1391(b).

The State of Ohio through its Attorney General participated in the proceedings before the Fifth Circuit by submitting an Amicus Curiae Brief and presenting oral argument. The positions expressed by the State of Ohio before the Fifth Circuit remain viable before this Court. The position of the State of Ohio, based upon its experience in the tender offer field is therefore, in opposition to the determinations made by the district court which were affirmed by the Fifth Circuit.

Contrary to the decisions of the district court and the Fifth Circuit, state tender offer statutes do not conflict with the Williams Act amendments to the 1934 Act. Both state and federal regulation in this field have as their goal the protection of investors. The Williams Act presumably achieves that goal by providing investors with certain

disclosure and time requirements which are intended to enable the equity shareholders of an offeree corporation to make an informed investment decision. With admittedly longer time-requirements and somewhat altered disclosure provisions, state statutes accomplish the same result. Rather than being in conflict, state and federal schemes for the regulation of tender offers are compatible. Indeed it is submitted that the application of state tender offer statutes has been more successful, relative to the Williams Act, in accomplishing the goal of investor protection.

Historically, the entire field of securities regulation has been one of concurrent jurisdiction between state and federal authorities. Section 28(a) of the 1934 Act, 15 U.S.C. § 78bb(a), clearly permits the existence of state securities laws and the legitimate benefits derived through the existence of state statutes do not unconstitutionally impinge upon interstate commerce. This is particularly true when state statutes are appropriately viewed as the regulation of internal corporate affairs.

Finally the invalid assertion of jurisdiction over the Idaho officials in this case by the United States District Court for the Northern District of Texas transcends clearly established principles of due process. The court decisions in this case permit the assumption of jurisdiction over any state official in any forum in the United States upon the basis that the state official could perceive foreseeable consequences in the foreign forum. If this standard is accepted as the permissible scope of jurisdiction over a state official, then longstanding concepts of federalism and comity must fall.

ARGUMENT

I. PREEMPTION

The Fifth Circuit determined that the Idaho Corporate Takeover Law[1] was preempted due to the adoption

[1]Idaho Code Sections 30-1501 to 30-1513.

of the Williams Act amendments[2] to the 1934 Securities Exchange Act.[3] In its analysis the Fifth Circuit concluded that the Idaho statute conflicted with the Williams Act in such a fashion that the state law stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[4] The purpose of the Williams Act is investor protection[5] which is accomplished through what the Fifth Circuit labeled as the "market approach"[6] to the regulation of tender offers. The hallmarks of the market approach and the foundation for the operation of the Williams Act is the neutrality and evenhandedness with which the Federal law treats offeror and offeree corporate management.[7]

In conflict with the market approach of Congress is what the Fifth Circuit identified as the "fiduciary approach"[8] embodied in the Idaho statute. The court reasoned that the ability of offeree management under the Idaho statute to cause delays in the tender offer process

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[2]15 U.S.C. §§ 78m(d, e), 78n (d-f) 1970; § 13(d, e), 14 (d-f) of the Securities Exchange Act of 1934 (hereinafter the "Williams Act").

[3]15 U.S.C. § 78a et seq. ("1934 Act").

[4]*Great Western United Corporation v. Wayne L. Kidwell Attorney General of Idaho, Tom D. McEldowney, Director of the Department of Finance of the State of Idaho,* 577 F.2d 1256, 1280 (5th Cir. 1978) (hereinafter 577 F.2d at ____.)
Hines v. Davidowitz, 312 U.S. 52, 61 (1940).

[5]577 F.2d at 1276.

[6]577 F.2d at 1276.

[7]577 F.2d at 1277 citing Senate Report No. 550, 90th Congress 1st Sess. at 3 (1967); *Piper v. Chris Craft Industries, Inc.,* 430 U.S. 1, 30-31, (1977); *Rondeau v. Mosinee Paper Corp.,* 422 U.S. 49 at 58-59 (1975).

[8]577 F.2d at 1279.

by involving regulatory review[9] indicated a preference for incumbent management over management of the offeror.[10] The district court concluded that the pro-incumbent management provisions of the Idaho statute evinced a legislative purpose "to inhibit tender offers for the benefit of management".[11] While the Fifth Circuit was unwilling to embark upon an analysis of the purposes of the Idaho legislature, it nevertheless clearly indicated that the preference of incumbent management was the reason for preempting the Idaho statute.[12]

The Fifth Circuit also determined that the disclosures required by the Idaho statute were incompatible with federal requirements and the market approach in both the preemption and commerce rulings. This was premised on what the Fifth Circuit labeled as reports "so complicated that few shareholders would want to read them."[13] Unfortunately the Fifth Circuit did not identify what material required by the Idaho statute would make the reports so detailed as to constitute an obstacle to the accomplishment of the purposes and objectives of Congress. It is also unfortunate that the court did not recognize that the disclosures required by the Idaho statute are either contained in the Williams Act or are based upon the information required by a Form S-1 utilized for new registrations under the 1933 Securities Act.[14] The con-

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[9]Idaho Code § 30-1503(4).

[10]577 F.2d at 1279.

[11]*Great Western United Corporation v. Wayne L. Kidwell et al.,* 439 F. Supp. 420, 437 (1977) (hereinafter 439 F. Supp. at ____).

[12]577 F.2d at 1279-1280.

[13]577 F.2d at 1280-1281.

[14]53 N.Y.U. L. Rev. No. 4, 918(1978) cf. Miskin & Maloney, *Great Western United Case: End of State Takeover Laws,* N.Y. L.J., Aug. 29, 1978 at col. 1, page 1, col. 3 page 2, col. 1 page 3.

clusion is therefore without merit unless the court is willing to evaluate the entire scope of federal securities disclosure.

Beyond the infirmities of the Fifth Circuit's disclosure determinations an overall analysis of state tender offer statutes reveals that, whatever the initial cause for their adoption,[15] they have achieved the purpose of the Williams Act – investor protection. They have achieved that goal in a manner which does not conflict with the Williams Act. Recent decisions of this Court have affirmed the role of the states in the securities field.[16] The Court has also clearly indicated that the purpose of the Williams Act to be investor protection.[17] The evenhandedness of the Williams Act is not a goal in and of itself but is a mechanism to accomplish the overall purpose. Ironically, not only do the state statutes achieve the goal of investor protection but the mechanical operation of the state statutes and the Williams Act is similar.[18] The difference between the state tender offer laws and the Williams Act is one of degree. It is not one of conflict. The state statutes have achieved investor protection by providing delays in the tender offer process. It is true that these delays are greater than those contemplated by the Williams Act.

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[15]It has been asserted that the state takeover acts were adopted in response to tender offers or rumored tender offers for major state industries in a given state. See N. 21 and accompanying text. 53 N.Y.U.L. Rev., No. 4. 876 (1978).

[16]*Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117 (1973); *Silver V. New York Stock Exchange,* 373 U.S. 341 (1963). *Piper v. Chris Craft Industries, Inc.* 430 U.S. I, 29, (1977). *SEC v. National Securities Inc.,* 393 U.S. 453, 461 (1969), § 28(a) 15 U.S.C. § 78 bb(a).

[17]*Piper v. Chris Craft, supra.*

[18]53 N.Y.U.L. Rev. No. 4, 878-886 (1978).

The district court and the Fifth Circuit determined that the state mandated delays were a protectionist tool solely for the benefit of entrenched management and presumably enabled offeree management to totally defeat a tender offer.[19] The Fifth Circuit found these state delays to be disruptive of the "market-neutrality-approach" of Congress. In support of its position the Fifth Circuit cites testimony given in Congress on the Hart, Scott, Rodino Antitrust Improvements Act of 1976.[20] However, the rules adopted under the Antitrust Improvements Act effective on September 5, 1978 provide delays greater than the Williams Act.[21] Indeed, even the Securities and Exchange Commission has in Proposed Rule 14e-2(a) extended the period for making an offer.[22] Although the court's reliance on the precedents it cites is less than strongly supportive of its position, the delays caused by state statutes are a well recognized difference between the Williams Act and the state statutes. It is the effect of these delays and presumably their conflict which is a central issue in the preemption of the state statutes.

Rather than being in conflict with the Williams Act, delays caused by state statutes have benefited investors and have furthered the purposes of the Williams Act. State statutes have created a bidding market for the securities of the offeree corporation which has redounded to the benefit

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[19]577 F.2d at 1278; 439 F. Supp. at 437.

[20]577 F.2d at 1277, 1278.

[21]15 U.S.C. § 18a (West Supp. 1977); 16 C.F.R. § 801.1-803.9 (1978).

[22]Proposed Rule 14e-2(a) 1976-77 Transfer Binder, CCH Fed. Sec. Law Rep. ¶ 80,659L.

of the offeree shareholder.[23] A by product of that delay has been an end to the so-called "Saturday night special" which was an acceptable technique under the Williams Act.[24] In addition to creating a bidding market which is the antithesis of the knee jerk response forced upon investors by the Saturday night special, state tender offer acts have through their delays provided sufficient time for investors to review the offering documents and evaluate their alternatives. In short, the statutes have provided the investor with the necessary time to evaluate his alternatives and make an investment decision.

In addition the statutes have aided in the accomplishment of the other goals attributed to the Williams Act. Rather than frustrating the neutrality between managements, the state statutes have placed the managements on a more equal footing. Target management is expected to review the offer, and respond to that offer in an exceedingly short period of time. This task simply cannot be completed within the permissible time frames of the Williams Act.[25] Certainly these tasks cannot be performed in such a time frame consistent with management's well-recognized fiduciary duties which of necessity come into play.[26]

[23]The primary example of such a result is the tender offer of United Technologies for Babcock and Wilcox. Delay caused by the Ohio Statute (R.C. § 1707.041) resulted in a bidding market for the shares of Babcock & Wilcox when J. Ray McDermott entered the contest and was eventually successful by acquiring Babcock & Wilcox at $65. per share – $23. above the United Technologies initial offer and $30. above the selling market for Babcock and Wilcox prior to the tender offer. Other examples from the Ohio experience include the General Cable offer for Microdot where Northwest Industries intervened and was successful with a competing offer of $4. above the initial offering price of $17. Thrall Car Manufacturing lost a tender offer struggle to Sampson & Sessions when the latter corporation completed the offer at $3. above the initial bid. In the Esmark attempted takeover of Inmont the two corporations reached an agreement in the face of the Ohio statute which permitted Inmont to seek a better offer. Carrier Corporation was successful in acquiring Inmont at $32. per share. The initial Esmark offer was $25. per share.

[24]E. Aranow, H. Einhorn & G. Berlstein, *Developments in Tender Offers for Corporate Control*, 218 (1977).

An underlying premise of the Fifth Circuit analysis insofar as conflicts between the state statutes and the Williams Act appears to be the conception that the State statutes provide sufficient time for offeree managements to absolutely defeat an offer. Historically this is not the case. Due to the tremendous attention focused on the offeree corporation by the news media it has almost invariably been acquired by the initial offeror or a subsequent bidder or through a friendly merger with a "white knight". The fact of the matter is that an offeree corporation, once subjected to a tender offer, has surrendered its separate existence.[27] Ultimately, therefore, the decision is not in the hands of offeree management but in the hands of the investor.[28]

II. COMMERCE CLAUSE

The Fifth Circuit also affirmed the decision of the district court that the Idaho statute constitutes an undue burden on interstate commerce and is therefore violative of the Commerce Clause, Article 1 § 8, of the United States Constitution. The Fifth Circuit predicated its determination upon the balancing test enunciated in *Pike v. Bruce Church, Inc.*[29] The test enunciated in *Pike* indicates that

[25]53 N.Y.U.L. Rev. No. 4, 874 (1978).

[26]Id at 899 N. 196, 197.
Id at 915 N. 314.

[27]53 N.Y.U.L. Rev. No. 4, 903, 913.

[28]Id.

[29]397 U.S. 137 (1970).

the general rule for determining the validity of a state statute affecting interstate commerce is to determine, "where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[30] The district court determined that the sole purpose of the Idaho statute was the protection of incumbent management and that it therefore had no legitimate local purpose.[31] The Fifth Circuit assumed that the Idaho statute had two ligitimate local purposes. Those legitimate purposes were investor protection and civic responsibility on the part of local corporations.[32] Although the Fifth Circuit found investor protection to be a legitimate local purpose the court candidly indicated that this interest was attenuated due to the fact that Idaho had only two percent of the shareholders of the offeree corporation, the Sunshine Mining Company, within the state's boundaries.

Against these two ligitimate local purposes the Fifth Circuit balanced what it incorrectly perceived as the burdens on interstate commerce. Those burdens included the disruption of the national securities markets,[33] the potential of offerors making low offers when initially faced with state statutory opposition,[34] the chilling effect on offers,[35] and the impact of Assistant Finance Director Baptie's letter in stopping thirty one million dollars of interstate

[30]397 U.S. 137, 142 (1970).

[31]577 F.2d at 1282.

[32]577 F.2d at 1283.

[33]577 F.2d at 1283.

[34]Id.

[35]Id.

commerce.[36] In addition the Idaho statute alters disclosures in other states[37] and there are potentials of conflicts between the states which were evidenced by the possible conflicts between Idaho, New York and Maryland.[38]

The legitimate local interests were also discounted because investor protection was not guaranteed[39] by the statute and civic responsibility could be achieved by less burdensome regulation.[40]

Even if the *Pike* balancing test is accepted as the standard to be applied, the state statutes do not constitute an undue burden on interstate commerce. State and federal regulation of the securities industry has always been one of concurrent jurisdiction.[41] Indeed, state laws in the securities field predate the federal securities acts and have previously withstood constitutional challenge based upon the commerce clause.[42] Section 28(a) of the 1934 Act, as the Fifth Circuit recognized, is a preservation of state authority not a declaration of its permissible scope.[43] It cannot be said therefore that the field of securities regulation is subject to a pervasive federal scheme or demands a uniform national rule such as to displace state tender offer statutes.

The fundamental issue is, however, not whether the states have legitimate local interests. We have previously demonstrated the benefits for investors derived under the

[36]Id at 1284.

[37]Id.

[38]Id.

[39]Id at 1285.

[40]Id at 1286.

[41]See N. 16 *supra*.

[42]*Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917).

[43]577 F.2d at 1281.

state statutes.[44] The issue is what interest does a state have in regulating a tender offer which admittedly has extra-territorial impact.

Contrary to the view of both the district court and the Fifth Circuit a tender offer is not an unrelated series of isolated securities transactions.[45] A tender offer, if successful, represents a dramatic change in the offeree corporation. A new board of directors is elected with consequent changes in fiduciary relationships.[46] Voting power of shareholders is diluted and often there is a subsequent merger.[47] These results are particularly true in a pro-rata offer such as the case in issue. Invariably the offeree shareholders remain in a minority position as a result of a pro-rata acceptance of shares. Even in a cash offer for any and all outstanding shares, a certain percentage of the offeree shareholders will not tender and remain therefore in a minority position in a corporation which is now controlled by the offeror. A tender offer is therefore a complete change in the offeree corporation. It is not merely a sale between shareholders or a potential shareholder. It represents a restructuring of the internal affairs of the offeree corporation.

Beyond question the regulation of internal affairs of corporations has always been a subject matter of regula-

[44]See N. 23 and accompanying test. A thorough analysis of state benefits is to be found in 53 N.Y.U.L. Rev. No. 4, § 92 (1978). Also note Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Case W. L. Rev. 722 (1970).

[45]577 F.2d at 1280 n. 53, "Second a tender offer involves the sale of securities from one shareholder to another, not a change in the corporation itself."

[46]Shipman, N. 44 *supra*.

[47]Id.

tion by the states.[48] Indeed, Congress, in approaching tender offer regulations, drew parallels to proxy contest which have consistently been an area of state and federal regulation.[49] It is completely legitimate therefore for the states through their tender offer laws to regulate the internal affairs of a corporation subject to a tender offer and that jurisdiction resides appropriately in the state of incorporation or where that corporation has its principal place of business.[50] In the matter at issue the Sunshine Mining Corporation had over fifty percent of its assets located in the State of Idaho as well as the company's principal offices. Historically, mining operations have been subject to regulation where the majority of the mines are located which in this case is Idaho.[51]

The indication by the Fifth Circuit that Idaho impermissibly overstepped its bounds by extraterritorially regulating when it had only two percent of the Sunshine shareholders misconceives the corporate nature of a tender offer and would seem to suggest that blue sky regulation based upon the number or a percentage of shareholders within

[48]*Travelers Health Ass'n. v. Virginia*, 339 U.S. 643 (1950); *Cort v. Ash*, 422 U.S. 84 (1975); *Santa Fe Industries v. Green*, 430 U.S. 462 (1977); *Piper v. Chris Craft Industries Inc.*, 430 U.S. 1 (1977).

[49]Senate Committee on Banking and Currency, Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids, S. Rep. No. 550, 90th Cong. 1st Sess. (1967) at 3.

[50]43, N.Y.U.L. Rev. No. 4. 929-939.

[51]The federal courts have consistently held that the principal place of business of a mining corporation is the state in which most of its mines are located. See *Continental Coal Corp. v. Roszelle Brothers*, 242 F. 243 (6th Cir. 1917); *Riggs v. Island Creek Coal Company*, 387 F. Supp. 1363 (S.D. Ohio 1974); *Spector v. Rex Sierra Gold Corp.*, 227 F. Supp. 550 (S.D.N.Y. 1964); *Hodges v. Georgia Kaolin Co.*, 207 F. Supp. 374 (M.D. Ga. 1962); *Potoeni v. Asco Mining Company*, 196 F. Supp. 912 (W.D. Pa. 1960); *Webster v. Wilke*, 186 F. Supp. 199 (S.D. Ill. 1960).

a given state is more appropriate and would not transcend any constitutional prohibition. We suggest that the adoption of a blue sky approach to the regulation of tender offers invites participation by a multitude of states, overlooks the corporate impact of a tender offer and is far less appropriate than the specialized legislation, designed for the very topic, which presently exists. The history of tender offers to date does not support the thesis that a multitude of states will impose conflicting regulations through their respective tender offer statutes on an offeror.[52] In the case at issue, while it was alleged that three states could have asserted jurisdiction, in fact, only one did, Idaho.

When appropriately viewed as the regulation of internal corporate affairs, the state statutes are well in bounds of any commerce clause guidelines. The legitimate local interest of the states do not burden commerce; indeed, they are a continuation of state participation in a recognized field. They preserve recognized fiduciary relationships between a shareholder and corporate management. They preserve an orderly corporate reorganization and provide time for a thorough analysis of the ramifications of a takeover bid on the part of offeree shareholders and management.

III. JURISDICTION

As a threshold question the Fifth Circuit and the district court determined that personal jurisdiction over the Idaho state officials was proper in the Northern Federal District of Texas. The Fifth Circuit based the assertion of jurisdiction upon the Texas long arm statute, Tex. Civ. Stat. Ann. art. 2031 (b) (Vernon, 1964) and independently

[52]The clearest example of state cooperation is the tender offer of United Technologies for Babcock and Wilcox where the New Jersey securities authorities relied on testimony produced in Ohio hearings for review under the New Jersey takeover act.

upon § 27 of the 1934 Securities Exchange Act, 15. U.S.C. § 78aa (1976). In making these determinations the Fifth Circuit established, over the dissent of Judge Godbold, new theories for the assertion of jurisdiction over a state official which will undoubtedly have significant impact not only in the field of tender offers but in the whole of state and federal relations. In support of the Idaho officials, the State of Ohio submits that the affirmance of the district court by the Fifth Circuit was in error.

A. Ex parte Young

The fundamental principles of federalism and comity are reflected in the Eleventh Amendment to the United States Constitution and its prohibition of suits against the states by foreign citizens. However, in recognition of the need to reconcile the competing demands of federal and state authority, this Court established the principle in *Ex parte Young*[53] that a state official could be subjected to suit in his individual capacity when that official sought to enforce an unconstitutional state statute. The decision in *Ex parte Young* has often been analyzed as the creation of a necessary fiction in order to effectuate the superior demands of the Federal Constitution.[54] The Idaho officials recognize the viability of the *Ex parte Young* doctrine. The Fifth Circuit, however, extended the doctrine considerably further than the principle of stripping a state official of his Eleventh Amendment immunity. The Fifth Circuit interpreted *Ex parte Young* to include permitting suits against state officials for all purposes in a foreign forum. Judge Godbold in his dissent correctly points out that the repercussions of such a conclusion will subject state officials to actions in a multitude of foreign jurisdic-

[53]309 U.S. 123 (1908).

[54]577 F.2 at 1265 citing L. Tribe, American Constitutional Law, 146 (1978).

tions.[55] The factual pattern in *Ex parte Young* simply does not support the Fifth Circuit's conclusion that a state official once stripped of the state's immunity, is a private litigant for all purposes and can be subject to a suit in any district where he could foresee possible consequences. *Ex parte Young* has never been extended to permit suits against state officials outside of their home districts, and the principles of federalism argue against any assertion of jurisdiction beyond that scope.[56]

B. Personal Jurisdiction Under The Texas Long Arm Statute

Coupled with the finding that *Ex parte Young* does not preclude suits against state officials in a foreign forum, the Fifth Circuit determined that personal jurisdiction over the Idaho officials was proper under the Texas long arm statute, Tex. Civ. Stat. Ann. art. 2031(b) (Vernon 1964). The Fifth Circuit concluded that the due process requirement of "minimum contacts" established by this court in *International Shoe v. Washington*[57] was fulfilled by the Idaho officials because their actions in enforcing their own state statute caused "foreseeable consequences" in the state of Texas.[58]

The foreseeable consequences test established by the Fifth Circuit represents a completely new approach to the assertion of jurisdiction over a state official, and does considerable harm to jurisdictional principles established by this court. Furthermore, it is not grounded upon a thorough analysis of the statute involved. The language

[55]577 F.2d at 1296. J. Godbold dissenting.

[56]*Judice v. Vail*, 45 U.S.L.W. 4269 (March 22, 1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Younger v. Harris*, 401 U.S. 37 (1971); *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1940).

[57]326 U.S. 310 (1926).

[58]577 F.2d at 1266-1270.

of the Texas long arm statute is directed at commercial activity. Factually, the Idaho officials acted solely in Idaho to enforce the Idaho statute. They were not engaged in any commercial activity. The Fifth Circuit seeks to circumvent this infirmity by stating that the "business" of Idaho is to regulate.[59] But this finding is inconsistent with the interpretation which the Fifth Circuit places upon *Ex parte Young* when it indicates that the state has no business in this matter. The court cannot on the one hand indicate that a state official is stripped of his state interest for purposes of initially commencing suit and on the other hand, use a state interest as a basis for jurisdiction in a foreign forum.

The initial internal inconsistencies of the decision only point to greater infirmities in the "foreseeable consequences" test. The assertion of *in personam* jurisdiction, whether grounded upon a state long arm statute or upon the 1934 Act, must fulfill constitutional requisites. The standard for *in personam* jurisdiction, as enunciated in *Hanson v. Denckla*[60] and affirmed in *Shaffer v. Heitner*,[61] is whether the defendant has purposefully availed himself of the privilege of acting in the forum jurisdiction. The Idaho officials took no actions in Texas nor have they sought any aid in enforcement from Texas authorities as the Fifth Circuit suggests would make them amenable to the long arm statute.[62] They certainly did not engage in a commercial activity in the State of Texas. The "foreseeable consequences" test simply does not support jurisdiction where the contact between the State of Idaho and the

[59]577 F.2d at 1268.

[60]357 U.S. 235 (1958).

[61]433 U.S. 186 (1977).

[62]577 F.2d at 1260.

State of Texas is so attenuated as this Court recently pointed out in *Kulko v. Superior Court.*[63]

C. Section 27 of the 1934 Securities Exchange Act

In addition to concluding that personal jurisdiction under the Texas long arm statute was appropriate, the Fifth Circuit affirmed the district court's finding that jurisdiction over the Idaho officials was also appropriate pursuant to § 27 of the 1934 Securities Exchange Act, 15 U.S.C. § 78aa, (1976).[64] This conclusion was predicated upon the finding that § 28(a) of the 1934 Securities Exchange Act created a duty upon the state officials not to enforce unconstitutional state statutes. Since § 27 postulates jurisdiction on the basis of violation of the 1934 Act, it is inescapable that the court concluded that the state officials had violated the 1934 Act.

As previously indicated § 28 of the 1934 Act does nothing more than preserve existing state authority in a recognized field of concurrent jurisdiction, namely, securities regulation. There is no prohibitive language in § 28(a) which would give rise to a violation of the 1934 Act by a state securities administrator.

The 1934 Act was designed to regulate stock manipulations and to prevent fraud in the sales of securities.[65] It is inconceivable that the state securities administrators who work with the Securities and Exchange Commission in the enforcement of securities laws are subject to the same criteria for jurisdiction as a stock manipulator. Section 27 was designed to afford jurisdiction to a plaintiff claiming to be a victim of interstate fraud if an event of material importance to a defendant's violation occurred

[63] 98 S. Ct. 1690 (1978).

[64] 577 F.2d at 1271; 439 F. Supp. at 430.

[65] *Hooper v. Mountain States Securities Corp.*, 282 F.2d 195 (5th Cir., 1960); cert. denied 365 U.S. 814 (1961).

in the forum district.[66] The claim by Great Western is that the Idaho officials violated the 1934 Act by enforcing the Idaho statute in Idaho. Presumably because that Idaho statute is preempted by the Williams Act, it is a violation of the Williams Act. Neither § 28(a) nor any other portion of the 1934 Act supports such a thesis.

CONCLUSION

Corporate tender offers represent a valid and lawful mechanism for the acquisition of a corporation through direct access to the offeree corporation's shareholders. They require regulation however, as both the states and the Federal government have recognized. The state takeover acts, as part of that regulation, impact the tender offer process in several extremely beneficial ways. State takeover acts have produced a bidding market for the shares of the offeree corporation through which target shareholders have benefited to an overwhelming degree. At the same time these statutes have resulted in a termination of the "Saturday night special" and as a corollary have provided shareholders with additional time to review and reflect upon their decision on whether to tender their shares.

These statutes have not been preempted as a result of the Williams Act nor do they unduly burden interstate commerce. There is no conflict between the Williams Act and the state tender offer statutes. Both seek to accomplish the identical result – investor protection – and they differ only in the time frames provided. Furthermore, these statutes are a continuation of the recognized authority on the part of the states to regulate internal corporate affairs. Such regulation does transcend any commerce clause limitation on the legislative power of state governments.

[66] Id.

The assumption of jurisdiction by the district court and the affirmance of that jurisdiction by the Fifth Circuit transcends recognized principles of federalism and violates due process and fundamental fairness. For these reasons, the decision of the Fifth Circuit must be reversed.

Respectfully submitted,

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v.

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Appellee

On Appeal From the United States
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Amicus Curiae Brief for the Commonwealth of Massachusetts

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Interest of the Amicus

Pursuant to Supreme Court Rule 42(4), the Commonwealth of Massachusetts submits this amicus curiae brief to reinforce the position of the State of Idaho (1) that the Idaho statute has not been pre-empted by the Williams Act amendments to the

Securities Exchange Act of 1934; and (2) that the Idaho statute does not impermissibly burden interstate commerce.[1/]

Like Idaho and some thirty-four other states,[2/] Massachusetts has enacted a takeover statute, M.G.L. c.110C, §§1-13, which imposes requirements on tender offerors beyond those mandated by the Williams Act. Much like the Idaho statute, M.G.L.

[1/] The position of the Commonwealth on the questions of jurisdiction and venue has been well presented in the amicus curiae brief filed by the State of New York, in which the Commonwealth has joined.

[2/] See Note: Securities Law and the Constitution: State Tender Offer Statutes Reconsidered, 88 Yale L.J. 510, 514 n.29 (1979) (compilation of all state takeover statutes).

c.110C establishes a procedural framework designed to promote informed and unhurried decisions by persons who receive tender offers for shares in target companies organized or headquartered in Massachusetts. The statute provides for full and fair disclosure of material information (§§2, 3, 5, 7), a waiting period prior to effectuating a takeover bid (§2), a minimum period during which a tender offer must remain open (§7), uniform treatment of all shareholders (§7), offeree withdrawal rights up to five days prior to the announced termination date of the offer (§7), pro rata take-up of shares in the event a greater number of shares are deposited than the offeror is bound to accept (§7), allowances for price increases (§7), a hearing procedure commenced at the discretion of the Secretary of the Commonwealth (§6), exemptions for certain transactions (§§1, 10-12), and civil and criminal remedies for violations (§9).

Recently, the constitutionality of the Massachusetts regulatory scheme has been challenged by a company seeking to make a takeover bid governed by the statute. On February 9, 1979, Tyco Laboratories, Inc. (Tyco), a Massachusetts corporation, announced its intention to make a tender offer for the shares of Ludlow Corporation, also a Massachusetts corporation. On the same day, Tyco filed suit in the United States District Court for the District of Massachusetts, claiming that the Massachusetts takeover statute was pre-empted by the Williams Act and created impermissible burdens upon interstate commerce. Tyco Laboratories, Inc., et al. v. Connelly, et al., Civil Action No. 79-265-T (complaint filed Feb. 9, 1979). Relying heavily on Great Western United v. Kidwell, 577 F. 2d 1265 (5th Cir. 1978), Tyco asked the court for a temporary restraining order enjoining the appropriate

Massachusetts officials from enforcing the provisions of chapter 110C in the event the company went forward with its proposed tender offer. The court denied the request on February 13, 1979, and scheduled hearings in March to determine whether there exists a factual basis for Tyco's allegations that the Massachusetts statute significantly frustrates the purpose and operation of the Williams Act and that it imposes undue burdens upon interstate commerce.

Because the substantive issues in the Great Western case are identical to those presented in Tyco, the continued viability of the Massachusetts statute may depend upon whether this Court rejects the course which the Fifth Circuit has taken in its invalidation of the Idaho statute. Accordingly, the Commonwealth submits this brief in support of the appellants' position that the Idaho statute is neither

pre-empted by the Williams Act nor invalid under the Commerce Clause.

QUESTIONS PRESENTED

1. Whether the Idaho Takeover Statute stands as an obstacle to the Congressional purpose of shareholder protection expressed in the Williams Act amendments to the Securities Exchange Act of 1934 and is thus invalid under the Supremacy Clause of the United States Constitution.

2. Whether the Idaho Takeover Statute impermissibly burdens interstate commerce and is thus invalid under the Commerce Clause of the United States Constitution.

STATEMENT OF THE CASE

The Commonwealth of Massachusetts adopts and incorporates herein the statement of the case set forth in the Appellant's brief.

SUMMARY OF ARGUMENT

The Court of Appeals based its conclusion of pre-emption not on any manifestation of a Congressional intention to occupy the field of tender offer regulation, but rather on findings that the Idaho statute impermissibly conflicted with the purpose of the Williams Act. The Court viewed the effecuation of a policy of neutrality between offerors and incumbent management as a Congressional policy not to be disturbed by state action. This view, however, fails to recognize that the sole purpose of the Williams Act is to protect shareholders. Unless it can be shown that the Idaho statute frustrates that purpose, there is no pre-emption.

Because the Idaho takeover statute merely imposes certain reporting and timing requirements as a reasonable supplement to the Williams Act, and shares the same basic purpose of

investor protection, it must be sustained under the Supremacy Clause.

Idaho has an important and substantial interest in protecting shareholders of target companies. The putative burdens on interstate commerce, which did not materialize in this case, are not disproportionate to the legitimate benefits the statute provides.

ARGUMENT

I. THE IDAHO TAKEOVER STATUTE DOES NOT CONFLICT WITH THE PURPOSE OR OPERATION OF THE WILLIAMS ACT AND STANDS AS A LEGITIMATE STATE EFFORT TO REGULATE CORPORATE TAKEOVERS.

The standards governing the application of the Supremacy Clause to state regulatory efforts separate two lines of inquiry: (1) whether there is clear evidence of a Congressional intent to occupy the field; and (2) whether the state action actually conflicts with the purpose and operation of federal law. Florida Lime & Avocado Growers, Inc. v. Paul,

373 U.S. 132, 141 (1963). In addition, because of the delicate balancing required whenever considerations of federalism are implicated, special rules have evolved for the specific contexts in which a pre-emption question arises. See City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638 (1973) ("Our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question . . ."). Traditionally, the field of securities transactions is one in which state regulation has been allowed to co-exist with the federal scheme[3/] and where "the proper

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[3/] See, e.g., Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950).

approach is to reconcile 'the operation of both [state and federal] statutory schemes with one another rather than holding one completely ousted.'" Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 127 (1973), quoting Silver v. New York Stock Exchange, 373 U.S. 341, 351 (1963). See also SEC v. National Securities, Inc., 393 U.S. 453, 461 (1969) ("Of course, under the securities laws state regulation may co-exist with that offered under the federal securities laws.").

The Court of Appeals acknowledges that "[n]othing in the 1934 Act explicitly pre-empts all state takeover legislation; indeed §28 [of the Securities Exchange Act of 1934] has a contrary tone." It is beyond question that there is no clear manifestation of a Congressional intention to assert exclusive federal regulation of tender offers, and §28(a) may well be read to create a

presumption against pre-emption.

Moreover, the Williams Act does not create a pervasive and comprehensive federal regulatory scheme which may evidence a Congressional intent to occupy the field of tender offer regulation. See New York State Dept. of Social Services v. Dublino, 413 U.S. 405, 415 (1973) (pre-emption not to be inferred solely from comprehensiveness of federal regulation). Cf. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973). Rather, the Act requires certain minimum disclosures relative to tender offers, and affords certain substantive protections to tendering shareholders.[4/] As such, it

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[4/]Section 14(d) of the Act provides that a person making a formal tender offer must file a Tender Offer footnote continued

represents a limited, and under the terms of §28 of the Act, non-exclusive

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[4/]footnote continued Statement Schedule 14D-1. 42 Fed. Reg. 38341 (1977). The Schedule includes certain information which must be revealed to target company shareholders: the purchaser's identity and background; the amount and source of funds for the purchase; the extent of the purchaser's holdings in the target; any plans to liquidate, merge, or make other changes in the target's business or corporate structure in the event control is acquired; past negotiations or transactions with the target company; and financial information about the purchaser material to the offer. The Act also permits tendering shareholders to withdraw tendered stock during the first seven days footnote continued

entry into the relatively new field of cash tender offers.

The Court of Appeals' finding of pre-emption rests instead on a "conflict" between the Idaho statute and the Williams Act. The court suggests that the fact that Idaho "chose to protect investors differently from the way Congress protected investors" is a demonstration of conflict. Great

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4/ footnote continued following publication of the offer, or after sixty days if the offeror has not already purchased the tendered shares. If the offer is for less than all of the target's shares, the offeror must take up all shares tendered during the first ten days on a pro rata basis. Finally, a price increase must also be paid to shareholders who tendered stock at the lower price. 15 U.S.C. §78n(d)(5), (6), (7) (1976).

Western, supra at 1279. However, the mere demonstration of a difference between the state and federal schemes does not lead necessarily to the conclusion that there is sufficient conflict to violate the Supremacy Clause. See Florida Lime and Avocado Growers, Inc. v. Paul, supra, at 141 (the difference between state and federal regulatory schemes merely poses the pre-emption question; it does not answer it).

The proper test for determining a conflict is whether the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Hines v. Davidowitz, 312 U.S. 52, 67 (1941). Although the Court of Appeals purported to apply the Hines test to the alleged incompatibility between the Idaho statute and the Williams Act, it misconstrued the Congressional purpose and objective underlying the Williams

Act. The court viewed what it called a policy of neutrality among contestants in a tender offer to be the "cornerstone" of the Congressional approach to investor protection. Great Western, supra, at 1277. It is submitted that this conclusion is based on an erroneous interpretation of the purpose of the Williams Act.

As this Court has noted, there was no deliberate Congressional effort to create a condition of "neutrality" among competing parties. Any balance or neutrality came about as an incidental effect of the lawmakers' desire to require full and fair disclosure for the benefit of investors. Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 29 (1977). The state statutes, including Idaho's, promote the same basic purpose of disclosure and any perceived imbalance is not an effect which stands in the way of the "sole purpose" of the Williams Act. See

Piper v. Chris-Craft Industries, Inc., supra at 35. Moreover, because "tender offerors were not the intended beneficiaries of [the Williams Act]", id. at 28, adverse financial or tactical impact upon a tender offeror such as Great Western United is an insufficient basis upon which to find impermissible conflict. Therefore, the purpose and objective of the Williams Act -- investor protection -- is not frustrated by or in conflict with Idaho's takeover law but is supplemented by it.

The Idaho statute, and the others like it, build upon the disclosure requirements of the Williams Act and add to them further reasonable and complementary protections for shareholders. Idaho's law requires disclosure, tends to delay the consummation of tender offers, and perhaps makes their completion more measured and orderly. None of these

effects is incompatible with the Williams Act.

A realistic look at a corporate takeover supports this view. What is at stake is the acquisition of a corporation not by traditional methods of merger, sale of assets and the like, but rather by a massive and urgent offer to individual shareholders. Given the pressures of the situation and the offeror's desire to consummate the acquisition at the cheapest possible price, it is not unreasonable for states to enact statutes seeking more complete disclosure and sufficient time for shareholders to review the adequacy of the offer in the light of current and long range values.

Compared to other modes of acquiring corporate control, such as a sale of assets, mergers or other corporate transactions, the cash tender offer is likely to yield less

to the target's shareholders than might be obtained by the target's management in a negotiated takeover.[5/] Furthermore, it is

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[5/] One commentary notes:
"Even an overhead tender price is likely (in the absence of strong opposition) to produce less for a seller than would theoretically be produced by a hypothetical bargain between management of a seller single-mindedly devoted to getting the maximum price and management of a buyer equally devoted to paying the minimum price. Since the tender price is unilaterally set at what the buyer believes is just enough to capture the public stockholders' acquiescence, it will not reflect the same sharing of the full gains of the merger, which a single negotiator for the

footnote continued

probable that any delay resulting from

5/ footnote continued
seller is more likely to perceive and demand than would the dispersed stockholders of the seller. The seller's public stockholders are thus exposed to the risk of receiving less from a tender solicitor than they would receive in a bargain negotiated by diligent management, because each investor's individual interest is so fractured as to preclude either the efficient acquisition of investment information or the exercise of the concentrated bargaining power which would be available in a merger negotiation conducted on their behalf." Brudney and Chirelstein, Fair Shares in Corporate Mergers and Takeovers, 88 Harv. L. Rev. 297, 341 (1974).

the operation of state takeover statutes actually benefits the target's shareholders and leads to an increase in price. Pressures to sell quickly are alleviated and management has an opportunity, in the exercise of its strict fiduciary duty, to develop more attractive alternatives. Also, a longer period permits the formation of an auction market for the target's stock, eventually driving the price higher than the original offer. Thus, even if the original offeror is unsuccessful in its takeover bid, the target shareholder is likely to earn large returns. See Dodd and Ruback, Tender Offers and Stockholder Returns, An Empirical Analysis, Journal of Financial Economics (Dec. 1977).

These effects of state takeover statutes are beneficial to shareholders though they may inconvenience offerors. However, Piper makes plain that offerors are

not the intended beneficiaries of the Act but are among those to be regulated. Tender offerors, in short, are not guaranteed a positive result under the Williams Act, and any adverse impact upon them resulting from the state statutes is not to be deemed an impermissible conflict with the Congressional purpose.

Accordingly, because the Idaho statute does not conflict with the federal objective of protecting target company shareholders, it is not pre-empted by the Williams Act.

II. THE IDAHO TAKEOVER ACT DOES NOT IMPEDE THE FREE AND EFFICIENT FLOW OF INTERSTATE COMMERCE AND IS NOT INVALID UNDER THE COMMERCE CLAUSE.

The determination of the validity of the Idaho statute under the Commerce Clause requires the balancing of legitimate local interests against the degree of burden imposed on interstate commerce. Pike v. Bruce Church, Inc., 397 U.S. 137,

142 (1970). The Court of Appeals, applying the Pike formula, determined that the only legitimate state interests at stake were the protection of local shareholders and the encouragement of civic-minded management. Great Western, supra at 1282-83.

Though the Court specifically discounted Idaho's interest in protecting all shareholders in the target company, there is no principled distinction between extraterritorial protection of shareholders in the tender offer context and extraterritorial protection of shareholders in the context of other corporate acquisition methods. Indeed, this Court deferred to Delaware's "short-form merger" statute in Santa Fe Industries v. Green, 430 U.S. 462, 479 (1977), quoting Cort v. Ash, 422 U.S. 66, 84 (1975):

> 'Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.'

To the extent a tender offer seeks to effect a change in the control of a target corporation, it is directly related to the corporation's internal affairs, a matter traditionally recognized as a matter of state regulatory concern. Santa Fe Industries v. Green, supra.

Weighed against these interests, the only actual impact of the Idaho statute on interstate commerce recognized by the Court of Appeals was the stopping of a $31,000,000 offer to

purchase. Great Western, supra at 1284. The court's reliance on this event was in error, however, because the offer was "stopped" as a result of non-compliance with the Idaho statute. Rather, the court should have inquired into what the impact on commerce might have been even if Great Western United were to have complied with the statute's requirements. To measure the impact of anything other than compliance with the state scheme is to assess the constitutional validity of a result not intended by the Idaho legislature.

Moreover, because the Commerce Clause protects the interstate market as a whole, rather than particular firms, from burdensome state regulation, the Court should have assessed the likelihood that aggregate tender offer activity would be substantially burdened by the takeover statute. See Exxon Corp. v. Governor

of Maryland, 437 U.S. 117, 127-28 (1978) (court discounted assertion that oil companies would abandon their Maryland operations as a result of statute prohibiting integrated oil compoanies from owning retail gasoline stations; those suppliers' share of the market would likely be assumed by other suppliers so that total flow of goods in interstate market would not decrease). See also Ray v. Atlantic Richfield Co., 435 U.S. 151, 181 (1978) (amount of oil processed at Puget Sound refineries has not declined as a result of local tug escort requirement). The evidence suggests that such a reduction in tender offer activity has not occured.6/

6/Despite the existence of thirty-six state tender offer statutes, the use of the tender offer footnote continued

Viewed realistically, disclosure requirements, timing factors, pro rata purchase provisions, and minimum offering periods do not and have not excessively burdened interstate commerce in the light of the very real benefits they provide in reducing pressures on stockholders in the typical "Saturday Night Special" situation. State statutes also work toward the objective of ensuring that shareholders have the chance to

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6/footnote continued as a technique for seeking corporate control has "virtually exploded." See Mishkin & Nathan, "Tender Offers Continue to Surge As New Laws and Cases Alter Tactics," N.Y.L.J., Dec. 19, 1977, at 30, col. 1; id. at 32, col. 2, cited in Note, Securities Law and the Constitution: State Tender Offer Statutes Reconsidered, 88 Yale L.J. 510, 523 (1979).

receive adequate value for their shares.

Therefore, the "burdens" on interstate commerce are fully justified by the state of Idaho's legitimate interest in investor protection. The impact on interstate commerce does not outweigh the local benefits. Pike v. Bruce Church, Inc., 597 U.S. 137, 142 (1970).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be reversed and the complaint ordered dismissed.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

78-
No. 759

WAYNE L. KIDWELL, Attorney General of Idaho, and TOM D. MCELDOWNEY, Director of the Department of Finance of the State of Idaho,

Appellants,

against

GREAT WESTERN UNITED CORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE STATE OF NEW YORK, JOINED BY ALASKA, AMERICAN SAMOA, COLORADO, CONNECTICUT, FLORIDA, HAWAII, KANSAS, LOUISIANA, MAINE, MARYLAND, MASSACHUETTS, MICHIGAN, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, VIRGINIA, WEST VIRGINIA AND WISCONSIN, *AMICI CURIAE*

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In the

Supreme Court of the United States

OCTOBER TERM 1978

No. 759

Wayne L. Kidwell, Attorney General of Idaho, and Tom D. McEldowney, Director of the Department of Finance of the State of Idaho,

Appellants,

against

Great Western United Corporation,

Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE STATE OF NEW YORK, JOINED BY ALASKA, AMERICAN SAMOA, COLORADO, CONNECTICUT, FLORIDA, HAWAII, KANSAS, LOUISIANA, MAINE, MARYLAND, MASSACHUETTS, MICHIGAN, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, VIRGINIA, WEST VIRGINIA AND WISCONSIN, *AMICI CURIAE*

Interest of *Amici*

This appeal presents questions of great public interest: whether there was jurisdiction over officials of foreign states and venue over an action challenging the statutes of those foreign states in the Northern District of Texas, and whether the state statutes governing disclosure in take-overs of corporations principally located in those states

are valid under the commerce or supremacy clauses of the Constitution of the United States. These are all questions of first impression which will substantially affect state regulators of business and securities and state officials in defending actions of every sort.

New York has a special interest in this appeal, since the New York Attorney General was an original party defendant as the administrator of the Security Takeover Disclosure Act of New York (New York Business Corporation Law [hereinafter N.Y.B.C.L.] Art. 16, § 1600, et seq. See Statement of the Case at p. 7, *et seq. infra*).

Indeed, the Attorney General of New York had petitioned this Court for a stay pending an application for certiorari to review the District Court's finding of jurisdiction against the Idaho and New York defendants. That petition was denied on May 20, 1977.

While the District Court ultimately dismissed the case against the New York State Attorney General after trial, all of the procedural prejudice of appearing to defend an act of the New York State Legislature in a foreign forum had already been felt. New York's statute had been enjoined in Texas before it had been given an opportunity to defend.

As an Attorney General of a large state and Securities Administrator, Attorney General Abrams will feel the precedential effect of this decision which subjects state officials to a trial on the validity of their statutes in a distant Federal District Court.

The Attorney General and other officials of all 50 states and the territories as well, have an interest in defending statutes and administrative actions in their own states where personal jurisdiction and venue lie and Alaska, American Samoa, Colorado, Connecticut, Florida, Hawaii, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, Oregon, Pennsylvania, South Carolina, Virginia, West Virginia, and Wisconsin have joined in this brief *amici curiae** supporting appellant which is filed with this Court pursuant to Rule 42 of this Court.

New York is also interested in this litigation since it may affect the validity of its Security Takeover Disclosure Statute which is similar, although not identical, to that of Idaho.

At last count (Note: "Securities Law and the Constitution: State Tender Offer Statutes Reconsidered," 88 Yale L.J. 510 [1979]), thirty-six states** have enacted statutes

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* The State of Minnesota has joined in only the jurisdictional and venue points.

** Alaska Stat. §§ 45.57.010-.120 (Supp. 1978); Ark. Stat. Ann. §§ 67-1264 to -1264.14 (Supp. 1977); Colo. Rev. Stat. §§ 11-51.5-101 to 108 (Supp. 1976); Conn. Gen. Stat. §§ 36-347a to -347m (1977); Del. Code Ann. tit. 8, § 203 (Supp. 1977); Fla. Stat. Ann. §§ 517.35 to .36 (Supp. 1978); Ga. Code Ann. §§ 22-1901 to -1915 (1977); Hawaii Rev. Stat. §§ 417E-1 to -15 (1976); Idaho Code §§ 30-1501 to -1513 (Supp. 1978); Act of Sept. 8, 1977, Pub. Act 80-556, Ill. Ann. Stat. ch. 121½, § 137.5-1 (Smith-Hurd Supp. 1978); Ind. Code Ann. §§ 23-2-3-1 to -12 (Burns Supp. 1978); Iowa Uniform Securities Act §§ 502.102, .211-215 (1978), *reprinted in* 1A Blue Sky L. Rep. (CCH) ¶¶ 18,142, 18,161-165; Kan. Stat. Ann. §§ 17-1276 to -1285 (1974); Ky. Rev. Stat. §§ 292.560-.991 (Supp. 1978); La. Rev. Stat. Ann. §§ 51:1500-:1512 (West Supp. 1978); Me. Rev. Stat. Ann. tit. 13, §§ 801-817 (Supp. 1978); Md. Corp. & Ass'ns Code Ann. §§ 11-901 to -908 (Supp. 1977); Mass. Ann. Laws ch. 110C, §§ 1-13 (Michie/Law. Co-op. Supp. 1978); Mich. Comp. Laws Ann. §§ 451.901-.917 (Supp. 1978); Minn. Stat. Ann. §§ 80B.01-.13 (West Supp. 1977); Miss. Code Ann. §§ 75-72-1 to -23 (Supp. 1978); Mo. Take-Over Bid Disclosure Act, 1978 Mo. Laws S.B. No. 820, *reprinted in* 2 Blue Sky L. Rep. (CCH) ¶¶ 28, 201-214; Neb. Rev. Stat. §§ 21-2401 to -2417 (1977); Nev. Rev. Stat. §§ 78.376 to -.3778 (1973); N.H. Rev. Stat. Ann. §§ 421-A:1 to :15 (1977); N.J. Stat. Ann. §§ 49:5-1 to -19 (West Supp. 1978); N.Y. Bus. Corp. Law §§ 1600-1613 (McKinney Supp. 1978); N.C. Gen. Stat. §§ 78B-1 to -11 (Supp. 1977); Ohio Rev. Code Ann. § 1707.041 (Page 1978); 70 Pa. Cons. Stat. Ann. §§ 71-85 (Purdon Supp. 1978); S.D. Comp. Laws Ann. §§ 47-32-1 to -47 (Supp. 1978); Tenn. Code Ann. §§ 48-2101 to -2114 (Supp. 1978); Utah Code Ann. §§ 61-4-1 to -13 (1978); Va. Code §§ 13.1-528 to -541 (1978); Wis. Stat. Ann. §§ 552.01-.25 (West Special Pamphlet 1978); Tex. Administrative Guidelines for Minimum Standards in Tender Offers 065.15.00.100-.800, *reprinted in* 3 Blue Sky L. Rep. (CCH) ¶ 46,615.

which to some extent regulate takeover bids for corporations maintaining certain contacts with the state. These states have an interest in defending the acts of their Legislature which might be affected by this Court's determination. The plaintiff and the Courts below have not limited themselves to attacking the provisions of Idaho's statutes, but have directed their assertions of unconstitutionality at state takeover legislation, in general.

Although on May 20, 1977, New York ultimately determined that it did not have jurisdiction over the proposed takeover, before that time, New York had determined that the provisions of the Idaho statute and the action of the Idaho administrator in issuing the letter of comment were appropriate to protect the interests of the shareholders of Sunshine Mining Company, should it be found to be within New York's jurisdiction. Therefore, New York has a special interest in defending those actions which it has relied on as reasonable.

Questions Presented

The 10 questions over which jurisdiction was noted by this Court are placed in a slightly different order, but their numbers indicate the order of Appellant's Jurisdictional Statement.

A. Was there jurisdiction in the Northern District of Texas over the persons of officials of the State of Idaho or the "Williams Act" claims of the offeror?

The Courts below answered "yes." Appellants and *amici* contend that the answer should be "no."

1. Whether due process or federalism principles will allow a federal court in Texas to assert personal jurisdiction over officials of the State of Idaho, one of whom took no action whatsoever and the other of whom acted solely in Idaho in his governmental capacity by enforcing Idaho law, on the theory that the official acts in Idaho had consequences or practical effects in the State of Texas?

The Courts below answered "yes." Appellants and *amici* contend that the answer should be "no."

2. Whether a state official acting in his state solely in a governmental capacity by enforcing his own state's laws may be deemed to be "in" or "conducting" business in some other state for purposes of long-arm jurisdiction, state or federal, in the other state?

The Courts below answered "yes." Appellants and *amici* contend that the answer should be "no."

3. Whether the doctrine of *Ex parte Young*, which permits suit against a state official under circumstances where the Eleventh Amendment would bar a suit against the state itself, may constitutionally be extended to subject Idaho officials acting solely within their governmental capacity in Idaho to suit in a court sited in Texas?

The Courts below answered "yes." Appellants and *amici* contend that the answer should be "no."

4. Whether enforcement by a state official in Idaho of Idaho law which allegedly conflicts with a portion of the Securities Exchange Act of 1934 constitutes a "violation" of said Act for purposes of federal court jurisdiction thereunder when no specific proscription of thereof has been breached?

The Courts below answered "yes." Appellant and *amici* contend that the answer should be "no."

10. Whether a tender offeror has standing to maintain an action under the Williams Act amendments to the Securities Exchange Act of 1934 to challenge the constitutionality of state corporate takeover laws?

The Courts below have answered "yes." Appellants and *amici* contend the answer should be "no."

B. Was there venue in the Northern District of Texas over a claim by a nationwide corporation with its corporate headquarters currently located in Texas that Idaho state officials were unconstitutionally interfering with its attempt to take over another nationwide corporation with its principal place of business permanently located in Idaho?

The Courts below answered "yes." Appellants and *amici* contend that the answer should be "no."

5. Whether, in an action brought in Texas by a Texas resident against Idaho officials to invalidate an Idaho statutory scheme on the ground that it conflicts with or is preempted by the Securities Exchange Act of 1934, venue is proper in Texas either because (a) under the jurisdiction portion of the Exchange Act a "violation" occurred in Texas or (b) under general federal venue statutes the claim against the Idaho officials arose in Texas, under a theory that the plaintiff was affected in Texas by the acts in Idaho of an Idaho official in enforcing the Idaho law?

The Courts below answered "yes" under the Securities Exchange Act. The Circuit Court answered "yes", but the District Court answered "no", under general federal venue provisions. Appellants and *amici* contend that the answer should be "no" in all respects.

C. Has Congress preempted the regulation of corporate takeovers?

The Courts below answered "yes." Appellants and *amici* contend that the answer should be "no."

6. Whether Congress has reserved to the States, under Section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), the power to regulate corporate takeover offers in a manner which differs from that adopted in the Williams Act amendments to the Securities Exchange Act of 1934?

The Courts below answered "no." Appellants and *amici* contend that the answer should be "yes."

7. Whether, independently of Section 28(a), the States have the inherent power to regulate corporate takeover offers in a manner which differs from that adopted in the Williams Act amendments to the Securities Exchange Act of 1934?

The Courts below answered "no." Appellants and *amici* contend that the answer should be "yes."

D. Did the Idaho statute on its face or the aborted attempts at enforcement by Idaho officials unduly burden interstate commerce?

The Courts below answered "yes." Appellants and *amici* contend that the answer should be "no."

8. Whether a federal court may weigh the benefits of a state corporate takeover law against its alleged effect upon interstate commerce?

By implication, the Courts below answered "yes." Appellants and *amici* contend that the answer should be "no."

9. Whether, independently of Section 28(a), state corporate takeover laws constitute an undue burden on interstate commerce?

The Courts below answered "yes." Appellants and *amici* contend the answer should be "no."

Statement of the Case

Great Western United Prepares Its Takeover Bid for Control of Sunshine Mining Company

In the spring of 1977, the time when this takeover bid was launched, Great Western United (GWU) was a publicly owned conglomerate Corporation organized in Dela-

ware whose stock was traded on the New York Stock Exchange (PARISH, 130-132*). It had nationwide operations with substantial assets in Colorado and Nebraska (SEC form 10-K, GWU, pp. 26-29 [1975]). In December 1974, it had been taken over by two brothers, Bunker and Herbert Hunt who, between them, owned 65% of the stock. The year before, the corporate headquarters had been moved from Denver, Colorado, to Dallas, Texas, where the Hunts resided (37-54, 130-132, PARISH T 78-79, 4/18/77).

Sunshine Mining Company (Sunshine) also was a publicly owned conglomerate traded on the New York Stock Exchange. It was organized in the State of Washington and had corporate headquarters in Idaho and New York. Its major assets were real property holdings and mineral rights in the State of Idaho, particularly the Sunshine Mine, the largest silver mine in the United States. Sunshine's approximately 5,800,000 outstanding shares were held by approximately 30,000 shareholders (SEC Form 10K Sunshine [1975]).

Catastrophies had plagued that mine in the past two years. A devastating fire had claimed the lives of 90 miners and then a year-long strike (March 11, 1976-March 13, 1977), had closed it (40; SEC Form 10K Sunshine, pp. 9-10 [1975]). In December 1976, Hecla and Silver Dollar Mining Companies had waged an unsuccessful proxy fight for control of Sunshine. When that failed, they sold their 334,070 shares of Sunshine stock to GWU in an agreement in which GWU promised to reimburse them $200,000 for the cost of that fight from the Sunshine Treasury, if GWU should gain control of Sunshine (43-45).

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* Unless otherwise indicated number in parentheses refer to pages of the appendix. Items in the record not in the appendix are described. Transcript citations refer to the witness' name followed by a page in the appendix. Transcript citations not in the appendix refer to the witness, "T", transcript pages and date.

On March 18, 1977, Sunshine's common stock was selling for $14.25 per share (41). GWU allegedly offered $16.75 a share for two million shares if the Directors of Sunshine would recommend the offer to the shareholders. Sunshine did not respond during the prescribed time, and three days later, on March 21, GWU announced a proposed "tender offer" for two million Sunshine shares at $15.75 per share (BOSWELL, T 195, 5/24/77). That announcement was made in a press release by a New York public relations firm which showed that the tender offer was to be handled by an executive vice-president of GWU located in New York and was to be managed by the New York office of Kuhn-Loeb, Inc. (Notice of Proposed Offer to Purchase [5/21/77]).

On that same date it filed from New York a Schedule 13D with the Securities Exchange Commission supposedly complying with the Williams Act amendments (15 U.S.C. §§ 78l[i], 78m[d]-[e], 78n[d]-[f] [1970]) to the Securities Exchange Act of 1934. The Commission neither processes nor evaluates cash tender offers; it is a repository for disclosure. As a practical matter, enforcement of the disclosure requirements of the Williams Act is left to the federal courts in suits brought by unfriendly target companies (WHEAT T 270, 5/24/77). In its 13D statement, GWU stated that it was complying with the Idaho Corporate Takeover Law (Idaho Code §§ 30-1501-1513).

On that same day, March 21, GWU filed from New York an information statement with appellant McEldowney, Director of the Idaho Department of Finance, purporting to comply with the Idaho Corporate Takeover Law (BOSWELL T 143, 5/23/77).

Meanwhile, also on March 21, New York counsel for GWU, Skadden, Arps, Slate, Meagher and Flom, filed with the Attorney General of the State of New York, a brief, contending that Sunshine did not have a presence in New York sufficient to justify the exercise of jurisdiction under New York's Security Takeover Statute (STROM

117-118). This submission was immediately followed by telephone requests for a decision from the Attorney General as to whether or not New York would exercise jurisdiction (STROM 118-120).

It is undisputed that New York never took any action in exercise of jurisdiction over this tender offer. It is undisputed that neither the Attorney General nor Orestes J. Mihaly, Chief of the Securities Bureau and Securities Administrator for New York, had ever made any statement suggesting that New York would exercise jurisdiction over this offer (118, STROM T 22, 34, 4/18/77). It was plaintiffs' position that in a March 24, 1977 phone call Martin Weber, Special Deputy Attorney General, gave his opinion to Milton G. Strom, a member of the Skadden, Arps firm in New York, that New York was leaning toward jurisdiction over the tender offer (STROM 118-119).

The Idaho Administrator Asks Some Questions.

GWU's information was the first one ever filed under the Idaho statute and the rules promulgated to enforce it (BAPTIE T 381, 5/24/77). Melvin J. Baptie, charged with administering that statute under appellant McEldowney, took the registration statement home to avoid the phone calls which were inundating his office. In order to fulfill his duty of requiring full disclosure for the benefit of Sunshine shareholders and complying with GWU's understandable desire for speedy review, he prepared a letter of comment on March 25, which was his work alone (BAPTIE T 399-400, 5/24/77). Appellant McEldowney signed the accompanying order staying the 20-day waiting period until the statute was complied with (86-87).

Baptie's letter (77-85) requested:

(1) that missing portions of the schedule 13D be filed;

(2) disclosure of litigation between Sunshine and its Shareholders Committee and explanation of certain statements in that regard be explained;

(3) disclosure of information and reports by GWU, Hecla and Silver Dollar as to Sunshine's mining operations;

(4) correction of misstatements as to the effect of Idaho law on shareholders residing elsewhere;

(5) disclosure of facts about the offeror such as its stock, debts, and principal properties required by Idaho's rules and not supplied by GWU;

(6) disclosure of details of plans to recapitalize GWU and to dispose of one of its subsidiaries;

(7) disclosure of plans to repay GWU's loan of cash to purchase Sunshine shares, although Baptie pledged to keep the identity of the bank confidential;

(8) disclosure of GWU's definition of working control of Sunshine;

(9) disclosure of any working or financial agreements with Hecla, Silver Dollar or the Shareholders Committee;

(10) elimination of the use of a phrase indicating a "risk" to shareholders, if this offer were to purchase all shares;

(11) disclosure of the effect of issuance or sale of all of Sunshine's authorized, but unissued, stock;

(12) disclosure of the effect of a sale of Sunshine's subsidiaries on stockholders;

(13) response to a comment that the planned reimbursement of proxy fight expenses to Hecla and Silver Dollar may violate the Idaho Code provisions making it illegal to offer a higher price to controlling stockholders than is paid to others.

The District Court found that Baptie's letter was prepared independently and not influenced by Sunshine in any way (439 F. Supp. at 424 n. 4). All requests for disclosure relate to matters well within GWU's control and which a prudent shareholder should know before he decides whether to sell his stock on the open market, to hold it or to tender it for purchase in whole or prorated part by the offeror.

The letter and McEldowney's order were teletyped to GWU's Dallas Attorney, Steven C. Metzger, as they had requested on March 25, four days after filing (292; BAPTIE T 405, 5/24/77; BOSWELL T 148-149, 5/23/77). Baptie had indicated by telephone that he would make every effort to speed the processing of the filing, including scheduling a prompt hearing. He received no response to his letter of comment (BOSWELL T 156, 5/23/77).

A Texas District Judge Restrains the Operation of Statutes of Idaho, New York and Maryland.

On March 28, 1977, counsel for the Idaho defendants was informed by an outsider that GWU was seeking an *ex parte* temporary restraining order against them before the Hon. Robert Hill, District Judge of the United States District Court for the Northern District of Texas. After repeated phone calls to Judge Hill's chambers, they received permission to be heard on that application (BAPTIE T 405, 5/24/77). The Court scheduled argument for 9 a.m., March 30, in Dallas. Thereafter, the New York Attorney General and the Maryland Attorney General were informed of this application and subsequently received copies of the complaint and the application for the temporary restraining order (159-60).

On March 30th, two representatives of the Idaho Attorney General's office and one representative from the Maryland Attorney General's office appeared in the United States District Court for the Northern District of Texas

and opposed the issuance of a temporary restraining order against their state statutes on the basis that there was no personal jurisdiction over the defendants and that venue was improperly laid in the Northern District of Texas. The New York Attorney General sent a telegram objecting to jurisdiction and venue. However, on April 1, Judge Hill granted the motion enjoining the operation of the Idaho, Maryland and New York statutes and ordered an expedited consolidated trial of the preliminary and permanent injunction to be held on April 8, in Dallas. The New York Attorney General was informed that such an order had been entered but a copy never was received from the Court nor from the plaintiffs.

The District Court in Idaho Stays the Tender Offer

Meanwhile, on April 1, Sunshine Mining Corporation instituted an action against GWU in the United States District Court for Idaho alleging that the material filed by GWU failed to satisfy the requirements of the federal Williams Act. *Sunshine Mining Co.* v. *Great Western United* (Civil #77-1064). In that action plaintiff was represented by its New York counsel, Skadden, Arps, Slate, Meagher and Flom. On April 5, that Court issued a temporary restraining order against GWU's commencement of the proposed tender offer. That temporary restraining order was extended on April 8, and parties in the United States District Court for the Northern District of Texas on that day received notice of the order at 5:30 p.m., obviating the effect of any temporary relief which might have been ordered by the District Court in Texas. On April 22, the District Court for Idaho denied a preliminary injunction. On October 5, 1977, the suit was settled and dismissed.

The settlement provided that GWU's successor Hunt International Resources Co. (HIRCO) would offer $15 a share for a maximum of 1,275,000 shares. Sunshine Directors did not approve or recommend the tender offer.

HIRCO agreed to exchange securities or notes worth $15 per share for the balance of the 2 million shares it had originally sought. HIRCO's wholly owned subsidiary, Western Investment was formed to own the 28% of Sunshine purchased in the tender offer. George Michael Boswell, former Executive Vice President of GWU, was made President of Sunshine.

On December 4, 1978 Sunshine filed a complaint in the District Court in Idaho. *Sunshine Mining Co.* v. *Hunt International Resources Co.* (No. Cir. 78, 1323), alleging that HIRCO and GWU had violated the settlement agreement, committed fraud under § 10b and 10b-5 of the 1934 Act, and for failure to comply with the Williams Act. HIRCO has moved to dismiss the suit, contending, *inter alia,* that there was no jurisdiction and venue over it and that Texas was the appropriate forum. Those motions are *sub judice.* Meanwhile HIRCO brought suit against Sunshine in a state court in Dallas County, Texas, 14th Judicial District. *Hunt International Resources Corp.* v. *Sunshine Mining Co.* (#78-18126-A). That suit is also still pending.

Therefore, the tender offer at issue in this case which was not finally approved by the defendants is still under attack as violating the federal statute.

The Fifth Circuit Requires Preliminary Determination of Jurisdiction and Venue.

After the District Court's restraining order had been issued on March 30, counsel for Idaho and Maryland filed a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. On the following day, they sought a stay of the temporary restraining order. No stay was granted but a hearing on the appeal was set for April 5.

Counsel for GWU and for the Idaho and New York defendants appeared in the United States Court of Appeals for the Fifth Circuit on April 5. The Court's order was announced from the Bench and was filed the following day. It stayed the order of the Northern District of Texas and directed that the Court to consider the issues of jurisdiction and venue, entering findings of fact and conclusions of law on those issues before consideration of the merits of the complaint. It stated that because the "proceeding involves novel and difficult issues which had broad impact upon federalism . . . should the district court determine that it has jurisdiction and venue, it should consider certification of this determination under 28 U.S.C. § 1292(b) before trial on the merits" (COLEMAN, GODBOLD and CLARK, JJ) (34-35).

The Trial Begins and Jurisdiction and Venue Are Found.

On April 8, counsel for all defendants appeared in the United States District Court for the Northern District of Texas. All defendants moved to dismiss the complaint under Rule 12(b) of the Federal Rules of Civil Procedure because of lack of personal jurisdiction and improper venue. The New York and Maryland defendants had claimed that no case or controversy existed between plaintiff and them. The New York defendant also moved in the alternative for a change of venue because of inconvenience to parties and witnesses pursuant to 28 U.S.C. § 1404(a). Idaho and Maryland joined in that request.

Over the objections of defendants the Court permitted plaintiff to introduce testimony which purportedly touched on plaintiff's theory of jurisdiction and venue but which concededly involved the merits. For example, *Professor Leon Lebowitz,* Professor of Law at the University of Texas, testified to his activities as a member of the State Bar relating to consideration of a possible state tender offer law in Texas (LEBOWITZ 151-155). At that time, Texas had no law regulating tender offers, but before the trial was over, a rule to the same effect was

adopted by the Securities Commissioner. Tex. Administrative Guidelines for Minimum Standards in Tender Offers, 065.15.00.100-.800, 3 Blue Sky L. Rep. (CCH) ¶ 46,615. In any event, no connection was made between his testimony and the issues of jurisdiction and venue. Similarly, *John S. Guest,* a member of the firm of Kuhn, Loeb and Company in New York City, which was to manage the receipt of Sunshine Mining Company securities on behalf of GWU also testified. Despite his interest, he gave his opinion that state tender offer laws inconvenienced arbitrageurs ("a group of dealers acting for their own account. . . ." [GUEST 145]) because they may delay the consummation of the tender offer (GUEST 137-148). The relevance of that testimony to findings of jurisdiction and venue also was not shown. The other witnesses who testified were *Milton G. Strom, Esq.,* a member of Skadden, Arps, Slate, Meagher and Flom, the New York based attorneys for plaintiff (116-124); *Drew R. Heard,* a member of Shank, Irwin, Conant, Williamson and Grevelle, plaintiff's Dallas law firm (T 15-18, 4/8/77) and *James R. Parish,* Vice-President and Treasurer of GWU (63-87). None of this testimony was referred to by the Court in its order, although the Court stated that "these preliminary matters ["issues of jurisdiction and venue"] and the merits of the action are largely intertwined."

On April 21, 1977, Judge Hill issued an order, findings of fact and conclusion of law, holding that he had personal jurisdiction over the defendants (all state officials residing more than a thousand miles from the Court) on the basis of the Texas long arm statute and § 27 of the 1934 Act, and that venue was properly laid in Texas because the New York and Idaho defendants had allegedly committed acts in Texas which violated the Williams Act. Subject matter jurisdiction was found to exist under 28 U.S.C. §§ 1331, 1332, 1337 and § 27 of the 1934 Act as a suit "'. . . to enforce [a] duty or liability created by [the 1934 Act]'." (¶¶ 5-6).

The Texas District Court saw a case or controversy with the Idaho and New York defendants as to the validity of their laws. The Court held that the March 25th intrastate New York telephone call and New York's intrastate subpoena to *Sunshine* to determine the nature of *Sunshine's* New York place of business and its New York assets were the basis of a finding that "New York officials have arrived at the working position that they have jurisdiction . . ." and that "[t]hey are proceeding with an investigation on their own volition" (¶ 4). After two appearances in Texas, the District Court ultimately found that there was no case or controversy with the Maryland defendants because they "have not expressed any opinion on their jurisdiction over the proposed tender offer . . ." (¶ 5).

Judge Hill found that GWU would suffer an economic hardship if the New York and Idaho statutes were enforced, ". . . lock[ing] up" their funds ". . . for the duration of the State proceedings" and ". . . the delay occasioned by the enforcement of these state takeover laws will significantly jeopardize the success of the tender offer" (¶ 6).

Although the District Court found that GWU's suit was one to enforce a duty or liability under the 1934 Act, and that the Idaho and New York defendants had committed acts in Texas allegedly in "violation" of the Williams Act, it conceded that the enforcement provisions of the 1934 Act could not be constitutionally applied to defendants because they were acting in their official capacity. The Court said that prospective relief against the enforcement of the State laws was all that was permitted under *Edelman* v. *Jordan,* 415 U.S. 664, 667-8 (1974) (¶ 7).

Concluding that the Idaho and New York statutes had an extraterritorial effect which was more than incidental, the Court held that these statutes "substantially impinge on the freedom to contract of Texas residents" (¶ 18).

This alleged extraterritorial effect, the Court held, constituted doing business in Texas because the Court gave the Texas long-arm statute "maximum constitutional limits" (¶ 19). Without discussing the constitutional limit of state sovereignty, the Court found that there were minimum contacts with Texas and that it was fair and reasonable to require the defendants to come into the State to defend the action. This conclusion was reached although the Court also held that the claim against Idaho arose only in Idaho and that against New York only in New York (¶ 20). That extraterritorial effect was also held to constitute acts in Texas which purportedly were a violation of an unspecified portion of the Williams Act (¶ 22).

The District Court did not rule on the application for a change of venue for the convenience of the parties and witnesses under 28 U.S.C. § 1404(a). There was no reference to relative convenience of the parties, to the severe inconvenience of all the defendants and their witnesses, the inconvenience of some of plaintiff's witnesses and the lack of inconvenience to plaintiff if Idaho and New York forums were chosen.

Since the only basis for venue in the Northern District of Texas was the national venue provision of § 27 of the 1934 Act, the claim of burdening interstate commerce could not be brought there. However, the District Judge further exercised his discretion to require defendants to defend their state statutes in his Court by determining that pendent jurisdiction over the interstate commerce claim existed (¶ 23).

Finally, the District Court rejected the suggestion of the United States Court of Appeals that it certify the question of jurisdiction and venue. It suggested that one day probably would be sufficient for the trial and indicated that the defendants who had gone to the Court of Appeals for relief from the burden of a trial on the

merits outside their states and received that relief had been "obstinan[t]" in not submitting the validity of their statutes to the District Court in Texas (Order p. 2).

Preliminary Review of Jurisdiction and Venue Are Denied.

On the day they received the decision, the Idaho defendants served their petitions for mandamus and/or prohibition and for leave to appeal under 28 U.S.C. § 1291 and also filed their notice of appeal on that date.

The Idaho petition for mandamus and/or prohibition sought direction that the District Court dismiss the suit and nullify its findings of fact and conclusions of law. The New York petition for mandamus sought a direction to dismiss the suit or in the alternative, to certify the questions of jurisdiction and venue pursuant to 1292(b), or in the alternative, to transfer the action to the United States District Court for the Southern District of New York. It also joined in the applications made on behalf of the Idaho defendants.

All petitioners appealed and petitioned for leave to appeal on the ground that appeal was proper since it would effectuate ". . . the same policy Congress sought to promote in [28 U.S.C.] § 1292(b) by treating this obviously marginal case as final and appealable under 28 U.S.C. § 1291 . . .". The Court of Appeals had already directed the District Court to consider certifying the questions of jurisdiction and venue under § 1292(b).

On May 12, 1977, the United States Court of Appeals (COLEMAN, GODBOLD, TJOFLAT, CJJ.) denied the petition without opinion, stating that the Court assumed a prompt trial on the merits would take place. It did not rule on the New York defendant's application for a stay pending the determination of certiorari which was renewed on May 13, 1977. On May 18, 1977, Judge Godbold denied the stay.

Defendant Lefkowitz's application to this Court for a stay of proceedings in the Northern District pending an expedited petition for certiorari was denied on May 20, 1977 by Mr. Justice Powell and the defendants proceeded to trial.

On that same day, May 20, Orestes J. Mihaly, Assistant Attorney General in charge of the Securities Bureau, informed GWU that it need not register its proposed offer to purchase Sunshine securities in New York, primarily because ". . . the assets of the target company within the State . . . are not substantial within the meaning of [NYBCL § 1601(a)]" (439 F.Supp. at 428).

The Validity of the Idaho Takeover Statute Is Tried in Texas.

On May 23 and 24, 1977, the validity of the Idaho Corporate Takeover statute was tried before Judge Hill. The plaintiff introduced the Sunshine shareholders list. (T 25-27, 5/23/77), a deposition to show that the chief executive officer of Sunshine resided in New York and that Anchor Post, a subsidiary of Sunshine, owned some property in Texas (T 31-34, 5/23/77).

Plaintiff also called *Jeffrey B. Bartell,* Commissioner of Securities for Wisconsin and administrator of that State's Takeover statute since 1972. Only one unfriendly offer had been filed in Wisconsin in that time (180). He testified that the purpose of the Williams Act was to protect the shareholders of the target company from fraud and to require for their benefit disclosure of all material facts and prohibit omission of those facts. He stated that the state statutes, in general, were designed to achieve the same purpose as the Williams Act (222-224). The Wisconsin statute, he said, was almost identical to Idaho's (186-187). It was also his opinion that the Williams Act did not give sufficient protection to shareholders (214-215, 222-225).

He also noted that the North American Securities Administrators' Association was making efforts at cooperation and uniformity among the States in regarding takeovers. He knew of no instance where states had asserted conflicting jurisdiction and knew that States had deferred to a State with a superior interest (193, 216, 217).

Bartell was permitted to express his opinion that as a State Administrator he would not object if Congress were to preempt the state statutes, as long as the federal statute provided more protection for shareholders including more time for the shareholder and target company management to decide on the offer, and provided for review by the Securities Exchange Commission (SEC) before the offer is made (221-222). He noted that the number of takeovers and state statutes regulating them have increased each year, so that offerors have learned to live with the state statutes and any deterrence of offers which such statutes might have, has been diminished (198).

GWU then introduced the findings of fact of the Idaho District Court in the *Sunshine Mining Company* v. *Great Western United,* in denying a preliminary injunction to prove that it was now complying with the Williams Act disclosure requirements. It was thus relying on the decision of the Court to which it had deliberately avoided submitting itself—a court which would have had undisputed jurisdiction and venue over this action.

The Idaho defendants called *George Michael Boswell,* Executive Vice-President of GWU, to testify as to the facts he swore to in the complaint regarding the threat he had alleged was posed by the statutes of Idaho, New York and Maryland. He admitted that after a few hours, and without negotiation, GWU determined not to respond to Idaho's letter of comment. Among other things, Mr. Boswell testified, "We just reached a determination that

we might not ever be able to adequately respond to [Baptie's] letter" (BOSWELL T 156, 5/23/77).*

The defendants introduced the expert testimony of *Frank Wheat,* former member of the Securities Exchange Commission and champion of shareholders rights. He distinguished the impact on management and shareholders, of the three methods by which control of a corporation may be obtained; the exchange offer, the proxy contest and the cash tender offer (247-254). He characterized the exchange offer and the proxy contest as areas which are highly regulated by the SEC and, thus, giving management a protracted period of time in which to evaluate the merits of the proposed takeover. The cash tender offer, however, poses a strikingly different situation in that a shareholder (and management) must make a critical investment decision in a very short period of time (248-252).

The Williams Act was designed to fill a void of regulation where abuses of the cash tender offer ("blitzkrieging") were taking place (255-256). Mr. Wheat testified that the Williams Act should not be considered as completely filling this regulatory void. Specifically, he stated that: "[The Williams Act] was a first step . . . I certainly did not at the time consider it to be a final solution. I'm not sure anybody did" (258-259). In fact, when questioned whether the material filed under the Williams Act is reviewed by the SEC, Mr. Wheat stated emphatically that there is no such review. Contrasting the tender offer with proxy contests and exchange offers, Mr. Wheat observed as follows: "If you have a registration statement [or a] proxy statement which is part of that registration statement in connection with a merger or a sale of assets, that's reviewed

* Mr. Boswell became President of Sunshine after this takeover was effectuated and Western Investment had obtained 28% of the stock of Sunshine. Among the facts sought to be probed by the Idaho defendants in Baptie's letter of comment are ones at issue in Sunshine's current suit against HIRCO.

carefully by the SEC before it is permitted to become effective. [In a] proxy contest situation, there is some review by the SEC of the proxy materials" (256-257).

In order to compensate for this lack of review by the SEC, states have enacted takeover statutes. Mr. Wheat commented on their effect as follows: "[The state statutes] do four things. First of all, they require larger, longer period [sic] of time during which the tender offer must be publicized and open, which permits the management and Board of Directors of the target company to react, to obtain advice and information and to get that information out to stockholders. It also permits the introduction into the bidding of additional bids. They require additional disclosure going beyond that required by the Williams Act . . . they introduce the administrative process . . . by requiring an administrative review at the state level prior to the time the tender offer . . . becomes effective . . . and they include . . . a provision which, in essence, requires all shareholders of the target company to be treated equal." (257-259).

He discounted the possibility of conflict among jurisdictions in regulating takeovers (WHEAT T 311, 5/24/77) and explained the importance of administrative review before the offer. He stated "I think some administrative review is desirable. In the absence of administrative review, you're simply relegated to courts. Everybody is suing everybody else, claiming that the disclosures are inadequate, and the courts in this country are adequately burdened as it is. The administrative review process has worked very well in the case of other aspects of the securities transactions and the securities markets, and what the state statutes have done is to introduce an element of administrative review of the disclosure which was not present." (261-263).

William Chatlos, a principal of Georgeson and Company which solicits proxies, including tender offers, engages in

management consultation, especially with regard to relations with investors. Chatlos is in charge of these investor relations. He also has written and lectured widely on takeovers. Georgeson had participated for either the target company or the offeror in virtually all the unfriendly tender offers which had occurred since the passage of the Williams Act in 1970 (280-281).

He explained the emergence of the cash tender offer as a result of market conditions with cash available and price-earning ratios low.

He studied all hostile tender offers between the end of 1974 through the end of 1976. He found that in virtually all those situations, the target company did not survive (T 328, 5/24/77). Only 3 of 50 in 1976 did (T 328, 5/24/77). He said there was no difference if a state takeover statute applied or if it did not, as to protection of incumbent management (285-287). But he found those statutes very significant because they usually provided for more time in which an auction can devolop (284-285). In all takeovers, in which management of the target company did not survive, the stockholder who tendered received more for his share than the original offer—a total in two years of $150 million (281-282).

Chatlos regarded the secrecy and speed of the tender offer as very harmful, even to the shareholder who is willing to trade, since more time encourages a corporate auction market (284-288). Prudent management needs time to evaluate the company in an orderly meticulous way before it enters the bidding (282-284). He emphasized that the only control of the economic opportunism in takeovers is the existence of the state statutes and particularly the time they provide.

Chatlos indicated that it was an anomaly that SEC rules require at least 2 months to call a special meeting of the stockholders to liquidate a company but for "killing off a company, eight days is plenty of time" (354). Thus,

although the management of Micro Dot thought liquidation would be more profitable for the stockholders than takeover, it had to accede to the latter.

Chatlos noted that many, if not most, individual shareholders are not actively in the market buying, selling or trading; but instead hold on to their past purchases, having faith in the management of their company.

Idaho also introduced the testimony of *Melvin J. Baptie* their Deputy Administrator of Securities (T 380-423, 5/24/77) and in rebuttal, GWU introduced the testimony of *Stephen Metzger*, one of their attorneys who had dealt with Baptie (e.g., T. 437-441).

The District Court Invalidates the Idaho Law

On September 2, 1977, the District Court rendered its decision which declared the Idaho Corporate Takeover Law unconstitutional and enjoined its enforcement.

Judge Hill reiterated his holdings on jurisdiction and venue, but found that the cause of action against New York was moot because New York had decided that the filing requirements of its Security Takeover Disclosure Statute did not apply to a takeover of Sunshine. 439 F. Supp. at 428.

Judge Hill found that the Idaho Law was pre-empted by the Williams Act because the difference between the federal and state approach constituted an impermissible conflict. (*Id.* at 436-437). The Court found that Idaho law restricted the offeror whose rights it believed were affirmatively protected by the Williams Act (*Id.*). The differences which offended federal supremacy were the Idaho requirement that the offeror describe its business; that a hearing in Idaho could delay a tender offer as long as 30 days or, under special circumstances, even longer; and that registration and approval requirements of the Idaho Law do not apply if the Directors of the target company approve the offer. *Id.* The Court conceded that Congress had not

occupied the field of securities regulation nor was its interest so dominant that any state statute would be precluded. (*Id.* at 435).

Judge Hill also found the Idaho Law to unconstitutionally burden interstate commerce on several grounds. (*Id.* at 438-439). He thought that the Law expressed no legitimate local purpose (*Id.* at 438):

> "The ultimate purpose of the Idaho statute is to thwart tender offers and thereby prevent possible removal of the target company or its management, the closing of plants and related effects on the state's economy. But a state may not legitimate its regulation of interstate commerce by asserting this type of interest."

The Court held that the law "purposely precludes Great Western's making a tender offer anywhere" and that that was more than an incidental effect on interstate commerce. *Id.* at 439. He also stated that interstate commerce was burdened by the existence of "the state takeover statutes" because he believed an offeror has to comply with so many it discourages tender offers. (*Id.*).

The Court of Appeals Affirms the Texas District Court's Exercise of Jurisdiction and Venue and the Finding that the Idaho Law was Invalid

On August 10, 1978, the United States Court of Appeals for the Fifth Circuit affirmed the Texas District Court's decision; but it differed in its reasoning in some respects.

Both Courts below based their exercise of jurisdiction and venue on the finding that the defendants had a presence in Texas, had relied on the benefits of a Texas forum, had done business in Texas and had committed acts which violated the Securities Exchange Act of 1934.

The District Court had rested its finding partly on Idaho's supposed effect on some (489 of 33,000) shareholders of

Sunshine who resided in Texas. 439 F. Supp. at 424, 431. The Court of Appeals rested its findings solely on the effect of Idaho's Law on GWU. The Court of Appeals, unlike the District Court, seemed to regard GWU as being located exclusively in Dallas where its Directors resided. 577 F.2d at 1267-1268, 1273.

The District Court had held there was no venue under the general venue provisions of 28 U.S.C. § 1391(b) because a cause of action may arise in only one district, the weight of the contacts was in Idaho and the Court found that GWU was injured in "all other federal judicial districts, as well as in the Northern District of Texas." 439 F. Supp. at 433. The Court of Appeals (577 F.2d at 1273), found venue under § 1391(b) even if the claim could only be brought in one district because (577 F.2d at 1273):

> "The offer was initiated in Dallas, Texas. If there is a single place where the allegedly invalid restraint occurred, that place is Dallas. Although the result of Idaho's regulation was that Great Western could not make an offer to Sunshine shareholders who reside in districts throughout the country, the place of restraint, and thus the place where Idaho officials injured Great Western, was in Dallas."
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> [citations omitted]

The Court of Appeals referred to this Court's decision in *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 as authoritatively interpreting the Williams Act, although it had been ignored by the District Court. It nonetheless found that any additional advantage to the target company destroys the Williams Act "market approach" to regulating tender offers and therefore conflicts with the federal law. 577 F. 2d at 1256.

The Court of Appeals said the District Court was wrong in analyzing the State Legislature's motives, but it found

Idaho as a small state to have only a remote interest in protecting shareholders because so few of them live there. Despite the location of Sunshine in Idaho, the Court thought it only a coincidence that as many as 2% of Sunshine's shareholders were Idahoans. 577 F. 2d at 1283.

The Court also found that the appeal was not moot despite the fact that the tender offer had been consummated. Failure to comply with Idaho law still might have consequences, it reasoned. *Id.* at 1264-1265.

Judge Godbold dissented on the ground that there was no personal jurisdiction over the defendants. He stated that Texas had no interest in exercising jurisdiction over Idaho public officials. (*Id.* at 1290); that the defendants had not purposely availed themselves of the benefits and protection of the laws of Texas (*Id.* at 1289), and that the defendants were denied due process of law because the nature and quality of their contacts with Texas were too insubstantial to warrant the exercise of jurisdiction in that State. Judge Godbold criticized the majority's view that the effect of an Idaho law in Texas was a valid basis for personal jurisdiction. He noted that the potential widespread application of that doctrine belied the majority's claim that it would not affect other cases. (*Id.* at 1291). Judge Godbold also disagreed that § 27 of the Securities Exchange Act of 1934 conferred subject matter jurisdiction over the action.

Although he agreed with the majority on the other issues, he dissented because (*Id.* at 1296):

> "Jurisdiction and venue in the Northern District of Texas have been dubious, and fought over, in this case from the beginning. These threshold issues should not be submerged in this court in a rush to the merits, by the confecting of new and strained theories of jurisdiction and venue that will create new and vexing national and state problems and diminish the strength of the merits decision."

Summary of Argument

In order to sustain the decision of the District Court, the Fifth Circuit Court of Appeals had to make six separate holdings on jurisdiction and venue, none of which had any direct precedent and all of which will affect proceedings in the federal courts in the future. They will particularly burden the States in defending their statutes and officials outside their borders.

The Circuit Court for the first time held that State officials charged with enforcing a state statute alleged to be unconstitutional must be regarded by federal courts as private persons pursuing private business.

It found for the first time that service on the Secretary of State of the forum state, constitutionally subjected the officials of other states to jurisdiction there.

It found for the first time that a suit alleging that a state statute conflicted with the Securities Exchange Act of 1934 was a suit authorized by § 27 of that Act and that a state regulator of securities could be sued under it.

It found for the first time that a state regulator charged with enforcing a state statute conflicting with the Act was subject to suit as a "violator" and that venue could be placed wherever his "violation" had an effect.

It found for the first time that a complaint by a multistate corporation against a state regulator arises only where the executive offices of that corporation are located, even if the action involves out-of-state business in the state where the defendant resides.

It found for the first time that a corporation proposing to make a tender offer may seek the protection of the Williams Act Amendments to the Securities Exchange Act against a party not governed by that Act.

The Constitution, statutes, rules and case law were interpreted in that unexpected way so as to find jurisdiction

and venue in the State of Texas over Idaho officials doing the work of their State within its own borders. The law was manipulated to provide a Texas forum when an appropriate convenient one in Idaho was available. This was also to accommodate a multistate corporation doing business in Idaho in order to allow it to sue where its executive offices are located.

These findings are unjustified by the language of the statutes interpreted. They offend basic principles of comity in our federal system and the rights of the individual defendants to due process of law.

The Court's purpose in stretching the law of jurisdiction and venue was to review and invalidate for the first time a state statute regulating tender offers. Tender offers like GWU's are a relatively new mechanism for seizing control of a corporation. A tender offer is a public offer by an individual company or group (the offeror) to acquire a block of securities of a publicly held corporation (the target company). Idaho's law applies if the target company has its principal place of business and substantial assets in Idaho (Idaho Code § 30-1501[6]).

The Idaho statute and appellant McEldowney's attempt to enforce it were directed at serious problems which Idaho has a local interest in alleviating. The purpose of tender offers, in general, and GWU's offer for Sunshine shares, in particular, is to obtain control of a corporation. In this case, the corporation to be taken over had substantial assets in Idaho including control of precious natural resources. Idaho has a substantial interest in providing for an orderly restructuring of that corporation and to insure that its owners, the shareholders, be provided with information to evaluate the offer to determine whether to tender their shares, hold them or dispose of them on the market.

The Idaho statute complements the Williams Act amendments to the Securities Exchange Act which has the same purpose. Both require the offeror to disclose information to aid the shareholder in making this important decision,

but under federal law there is no administrative review to secure compliance. Furthermore, the current SEC rules would allow a tender offer to be complete within 10 days, unless the target company succeeds in obtaining judicial intervention. The Idaho statute provides review of disclosure by a neutral public administrator before the offer takes effect.

Neither the Idaho statute nor the aborted attempt at enforcing it conflicted with the federal statute. Congress in § 28 of the 1934 Act has expressed a permissive posture with regard to State securities laws. The Williams Act Amendments makes no additional restrictions on the States with regard to tender offers. Corporate law is also a tradtional subject for state control. Tender offers relate to both corporate and securities law and on both counts are properly regulated by the states.

The Corporate Takeover Law is designed to protect the shareholders, wherever they reside as owners of an Idaho Corporation, so that the statute does not discriminate against out-of-state residents.

In form, an order prohibiting a tender offer may be said to have an extraterritorial effect on the ability of shareholders in other states to tender their shares to the offeror, but a tender offer is actually a unitary transaction. It is a public announcement of a willingness to buy shares. The acceptance of shares is also a unified purchase. Both federal and state statutes regulate the transaction as a single one. Since the corporation whose structure is at issue is principally located in Idaho, its local interest in this transaction is substantial and the extraterritorial affects ancillary only. They are not so excessive as to unconstitutionally burden interstate commerce.

This statute vindicating local interests in a nondiscriminatory way is entitled to a presumption of validity, rather than the suspicion with which it was greeted by the Courts below which overreached to establish jurisdiction to invalidate it.

POINT I

The Texas District Court never had personal jurisdiction over the Idaho defendants.

Appellants Kidwell and McEldowney were unconstitutionally subjected to a trial and adverse judgment by a court which had not obtained personal jurisdiction over them. This serious judicial abuse was compounded by the fact that it was also an offense to the State of Idaho, whose statute McEldowney was enforcing, because that statute was put in jeopardy and ultimately declared void by a court sitting a thousand miles from Idaho's borders—the first time that has happened in the history of this country.

McEldowney and Kidwell, Finance Director and Attorney General of Idaho, were sued in Texas as if they were private individuals pursuing private concerns, taking advantage of the benefits of a Texas forum and violating the rights of persons protected by federal securities legislation.

A. This Court's Decision In *Ex Parte Young* Does Not Permit State Officials To Be Sued Outside That State.

The Courts below contended that jurisdiction in Texas was compelled by this Court's 1908 decision in *Ex parte Young,* 209 U.S. 123 (1908). But the rule of *Ex parte Young* was not at issue between the parties. It was conceded that there was subject matter jurisdiction in an appropriate Federal District Court to review the validity of Idaho's Corporate Takeover Law under the Supremacy and Interstate Commerce Clauses of the United States Constitution. It was conceded that at least defendant McEldowney was a proper party defendant. He did not assert sovereign immunity against federal judicial scrutiny of his actions. Therefore, the holding of *Ex parte Young* was not disputed by the defendants.

The Courts below, however, said that the theory of *Ex parte Young* converted state officials enforcing state statutes alleged to be invalid into private citizens engaging in private, rather than government, business. That is not what this Court had held.

The importance of *Ex parte Young* is that it set the limit of immunity from suit which could be claimed on behalf of states as sovereigns, because in our federal system state sovereignty is not absolute. See e.g. Justice Brennan's separate opinion in *Perez* v. *Ledesma,* 401 U.S. 82, 106 (1972). Thus, if a state statute or administrative action is in conflict with the United States Constitution it is invalid and in *Ex Parte Young* this Court held that an allegation of invalidity is sufficient to subject that statute or action to federal judicial scrutiny. If the challenged statute or action is invalid, it cannot be the act of the sovereign and the State is not a proper party, being immune from suit, in any event. Thus, the proper party defendant is the individual acting under it.

This Court has never stated that it must pretend that that proper party defendant is acting for his own benefit because he does not have immunity from suit. Quite the contrary, such suits against state officials usually name him with his official title and permit automatic substitution of his successors in office, as was the case here. The merits of most actions made possible by the doctrine announced in *Ex parte Young* could not be determined if the federal courts had to ignore the governmental role of the defendants. Yet the Fifth Circuit said (577 F. 2d at 1265):

> ". . . We read *Young* to say that a state official enforcing an unconstitutional statute is an individual defendant and nothing more. Under the reasoning of *Ex Parte Young,* the state has no interest in the lawsuit, for it is incapable of authorizing an unconstitutional act. . . ."

If that fiction had to be adopted as broadly as the Fifth Circuit suggests, there would be no "state action" in most Fourteenth Amendment cases and subject matter jurisdiction would be lacking. Yet, this Court has referred to *Ex parte Young* as significant in sanctioning the use of the Fourteenth Amendment "as a sword as well as a shield against unconstitutional conduct of state officers." *Juidice* v. *Vail*, 430 U.S. 327, 335 (1977).

If the District Court must pretend that McEldowney and Kidwell are private individuals and that "Idaho's 'business' is to regulate" (577 F. 2d at 1268), then the result cannot be to declare a statute unconstitutional. Must it pretend that the statute is a Corporate charter?

Even the Fifth Circuit did not stick to its metaphor. Throughout the decision it referred to the allegedly unconstitutional actions as "Idaho's." *Ex parte Young* should not be expanded to require courts to ignore reality. It deals only with the specialized sensitive area of sovereign immunity. It is not intellectually dishonest to treat state officials as individuals for naming them as defendants amenable to suit, but to recognize their public role for all other purposes. See *Edelman* v. *Jordan*, 415 U.S. 651, 675-6, n. 18 (1974).

Until this case, since 1909, Courts have consistently managed to do this. Judge Wisdom himself explained it well (*Louisiana Board of Education* v. *Baker*, 339 F. 2d 911, 914 [5th Cir. 1964]):

> "We acknowledge that there is a difference between an individual who may be stripped completely of his representative garb and a state agency inseparable from the state. We realize that an injunction, to the extent that it requires affirmative action by a state official, necessarily interferes with the administration of the state. But all of the corners of some useful fiction simply cannot be rubbed smooth. State immunity from suit under the Eleventh Amendment is an untidy

> area of the law. The time may even have come when it would be well to adjust to the realities, face up to the fact that in these actions against a state agency or public official, the party at interest is the State and hold that the Eleventh Amendment does not contemplate a suit based on state action contrary to the U.S. Constitution. Until that time comes, if it should ever come, the anomaly that enforcement of the Minnesota statute is state action for purposes of the Fourteenth Amendment but merely the individual wrong of Edward T. Young for purposes of the Eleventh Amendment . . . seems indispensable to the establishment of constitutional government and the rule of law."

Also see *Arthur* v. *Nyquist*, 573 F. 2d 134, 138 (2d Cir. 1978); *Board of Trustees of Arkansas A & M College* v. *Davis*, 386 F. 2d 730, 732-3 (8th Cir. 1968), cert. den. 393 U.S. 962 (1968); Louis J. Jaffe, "Suits against Governments and Officers: Sovereign Immunity"; 77 Harv. L. Rev. 1, 18-19 (1963).

In this case, Judge Wisdom went in the opposite direction. Instead of abandoning the fiction for reality which he had earlier recommended, he took the fiction several steps further, mocking reality and creating unnecessary friction among the states and between states and the Federal Securities Exchange Commission. While he recognized that a corporation only acts through its directors (577 F.2d at 1267-1268) it insisted that Idaho officials could be found to have acted outside its borders.

This Court's disapproval of legal fictions is expressed in the recent landmark decision on personal jurisdiction, *Shaffer* v. *Heitner*, 433 U.S. 186 (1977), in which it rejected the fiction that the stockholder derivative suit was against the corporate director's property, rather than his person. Compare *Dred Scott* v. *Sandford*, 19 How. 393, 425 (1856), where the Court indulged in a fiction that a person was property.

In cases in which jurisdiction is obtained under the doctrine of *Ex parte Young,* Courts quite ordinarily recognize that the relief is against the State. This is even true if limited amounts of money from the state treasury are to be paid (*Milliken* v. *Bradley,* 433 U.S. 267 [1977]; *Fitzpatrick* v. *Bitzer,* 427 U.S. 445 [1976]), or if title to state land is at issue (*Narragansett Tribe of Indians* v. *Murphy,* 426 F. Supp. 132 [D.R.I. 1976]), or if the organization of its Legislature is affected (*Baker* v. *Carr,* 369 U.S. 186 [1962]). In *Aldens Inc.* v. *Packel,* 524 F2d 258 (3d Cir. (1975), the Attorney General was sued under the doctrine of *Ex parte Young,* but the counterclaim he interposed was found to be made on behalf of the State.

Unlike the defendants in *Ray* v. *Atlantic Richfield Co.,* 435 U.S. 151 (1978), cited by the Circuit Court, the defendants in this case did not seek either the overruling or restriction of *Ex parte Young.* They only opposed the expansion of its legal fiction in such a way as to interfere with the Court's ability to deal with facts before it. Idaho conceded that the Supremacy and Interstate commerce clause claims could be litigated in Federal Court. The doctrine of *Ex parte Young* was not used in *Ray* to extend the arm of another state over the Governor or any other official of the State of Washington, nor did this Court find that any of the Washington State officials could be sued as individual violators of the Ports and Waterways Safety Act of 1972 (33 U.S.C.S. §§ 1221-1227; 46 U.S.C.S. § 391a), although it was ultimately held that certain Washington State statutes were preempted and although it had been alleged that those statutes unconstitutionally burdened interstate and foreign commerce.

At no place in any of the opinions in *Ray* v. *Atlantic Richfield, supra,* did any member of this Court suggest that Washington officials were individuals engaged in "business" although it found that they were not immune from suit.

B. Courts Sitting In Texas Have No Jurisdiction Over Idaho Officials Engaged In Governmental Activity In Idaho, Even If That Activity Is Alleged To Have Unconstitutionally Affected A Corporation With Executive Offices In Texas.

If the decision of the Fifth Circuit is sustained, an allegation that laws or administrative action in one state unconstitutionally affects residents or corporations with a presence in another will be sufficient to require the first state to enter the second to defend itself. The Texas "long-arm" statute (Texas Revised Civil Statutes, Article 2031[b]) establishes jurisdiction in the Texas state courts and indirectly in the United States Courts located in Texas. Thus, according to the Fifth Circuit theory, state courts in Texas also had personal jurisdiction over Kidwell and McEldowney. But, even stretched to its jurisdictional limit, the long-arm of Texas does not reach Idaho.

The Fifth Circuit held that *Ex parte Young,* 209 U.S. 123 (1908), compelled the result. It said that state officials, if they were stripped of their sovereign immunity, must be doing business. That "business" was regulation. (Compare *Brown* v. *Kentucky,* 513 F. 2d 333, 336 [6th Cir. 1975], in which regulation was recognized as a governmental function).

If regulation is business, then federal officials alleged to be acting illegally also are just individuals "doing business." Federal officials are subject to suit for illegal actions by analogy to *Ex parte Young. Philadelphia Co.* v. *Stimson,* 223 U.S. 605 (1912). The long-arm of Texas could compel them to defend in its State Courts, as well.

1. Service On Out-Of-State Officials Cannot Be Made Under The Federal Rules Of Civil Procedure

Service of Federal Court process under state "long-arm" statutes is authorized by Federal Rules of Civil Procedure,

Rule 4(d)(7) and 4(e). However, by their terms, Rules 4(d)(7) and 4(e) do not include service on a governmental organization of the State under Rule 4(d)(6).

Thus, even the Federal Rules recognize that State officials who are not immune from suit still are part of state government. Service on a governmental organization of a state is specially provided by Rule 4(d)(6). This only can be used where sovereign immunity does not apply, which often is when the suit is authorized by the doctrine of *Ex parte Young*.

The territorial limits of process established by Rule 4(f), Federal Rules of Civil Procedure, were far exceeded by the service in this case. The defendants were located neither in the State of Texas nor 100 miles from the Court. In *Clark County, Nevada* v. *City of Los Angeles, California,* 92 F. Supp. 28 (D. Nev. 1950), service on a municipal corporation under Nevada's Long-Arm Statute was found to be invalid on the ground that the only way to secure jurisdiction over a governmental entity referred to in Rule 4(d)(6) was pursuant to its provisions. Also see Moore's Federal Practice, 2d Edition, Vol. 2 ¶ 3.30.

The Texas Long-Arm Statute cannot be used to serve an agency of state government by serving the Secretary of State of another state. The Attorney General, and the Director of the Idaho Department of Finance, are such agencies and the suit is brought against them solely in their official capacity. They are not entities described in Rule 4(d)(3) of the Federal Rules of Civil Procedure nor individuals described in Rule 4(d)(1) of the Federal Rules of Civil Procedure. In *Wallach* v. *Cannon,* 357 F. 2d 557 (8th Cir. 1966), the Court held that service on the Oklahoma Tax Commission had to be made pursuant to 4(d)(6) and 4(f); and therefore it could not be sued in Missouri.

2. It Is Unreasonable To Interpret Texas' Long-Arm Statute As Exercising Jurisdiction Over Officials In Another State

There was no intention on the part of the Texas legislature to assert jurisdiction over officials of another state. In requiring a person "engaging in business in th[e] state" to designate an agent for service of process, it did not manifest its intent to require the Attorney General or Finance Director of Idaho to be amenable to process, even if their actions had an effect in Texas and even if the action was unconstitutional.

Considering the novelty of that interpretation the absence of any language in the statute which indicates such a result and the absence from the legislative history of any such intention, the Fifth Circuit's interpretation is unjustified. Texas had a motive not to include service on state officials who allegedly are administering an act which affects residents of Texas. Texas laws and its officials can be snared in the same net. It can be put to the expense and face the harassment of defending its actions in a distant state specially chosen from the entire nation by the plaintiff bringing the suit.

Interpreted as the Court of Appeals does, the Texas long arm statute would be unconstitutional as violating the Due Process of Law Clause, the Full Faith and Credit Clause and the Eleventh Amendment. Ironically it could be attacked in Idaho under the decision of the Court of Appeals, since it has an effect which would be felt only in Idaho where the defendants do their business.

The Circuit Court's interpretation reverses the flow of traffic which long-arm statutes are supposed to direct. Such laws vindicate an interest in the forum state. So a plaintiff who is a resident in Texas can sue someone with whom he has business dealings affecting his local business, although that person is not physically present in Texas. While the difficult cases are far more complicated, Texas

has very little interest in providing a forum for a large multistate corporation like GWU with a presence, assets, enterprises and the means of defending itself in virtually any state in the nation. Long-arm statutes regularly make corporations like GWU defend away from their executive offices, directors and majority stockholders. It is not for the benefit of this kind of plaintiff that the law should be so manipulated.

The Circuit Court's interpretation of the permissible limits of a state long-arm statute threatens Texas's interest as a forum. If that decision is affirmed, litigation concerning the takeover of a Texas corporation could be heard in the state where the offeror resides, rather than Texas. Yet, it has a distinct interest in jurisdiction in such a case and very little if any, in this one.

Here, it was the defendants who were permanently situated and the multistate plaintiff came to them to do "business." Long-arm statutes do not permit such plaintiffs to go home to bring suit about that business unless the defendants have far more contacts with the forum. GWU's business in Idaho was to take over a corporation principally located there. It is the ownership and control of Sunshine which was at issue here. GWU has always conceded that Sunshine was principally located in Idaho. It forcefully argued that contention to the Attorneys General of New York and Maryland. While the decision has an impact on GWU, it is in its Idaho operations that it is most directly felt. It has an impact because it was GWU that moved interstate, not the Idaho regulators.

The Court's analysis of this business venture was incorrect (577 F. 2d 1268):

> ". . . Idaho's out-of-state regulation had the *direct* effect of stopping a substantial commercial venture based in Texas. No other state had a greater connection with that venture than Texas. . . ."

The commercial venture here was not based in Texas. GWU was trying to buy control of a Company whose principal assets were real property and mines permanently embedded deep under the soil of the State of Idaho. Idaho's interest was paramount.

3. The Defendants Were Denied Due Process Of Law

The Court paid lip service to the proper Constitutional standard of fairness of the forum to the rights of the defendant extending from *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1946) through *Hanson* v. *Denckla,* 357 U.S. 235 (1958) to *Shaffer* v. *Heitner,* 433 U.S. 186 (1977) and *Kulko* v. *Superior Court,* 436 U.S. 84 (1978). But its assertion that the defendants could foresee a suit in Texas is unjustified. There is no precedent for obtaining jurisdiction over state officials of another State under a state long-arm statute or the Securities Exchange Act. GWU conceded Idaho's jurisdiction. Its object was to gain working control over an Idaho Corporation. Idaho did not depend on the enforcement of its order in Texas. A litigant's right to due process of law guarantees a fair forum. It cannot be required to have foreseen resort to Texas law. But even if Idaho as a State conceivably might have foreseen that possibility there is no chance that, as individuals "doing business", Kidwell or McEldowney would have.

In *Idaho Potato Commission* v. *Washington Potato Commission,* 401 F. Supp. 171 (D. Idaho 1975), the defendant Commission was acting in a proprietary capacity to promote Washington's produce. It was not even supported by state funds, but its individual members still could not be sued in Idaho for trademark infringement. The Court held (*Id.* at 182):

> ". . . It is doubtful that the individual members of the Commission could reasonably have anticipated that their activity in Washington could subject them to personal liability in a distant state such as Idaho. . . ."

In *Miller* v. *American Telephone and Telegraph Co.*, 394 F. Supp. 58 (E.D. Pa. 1975), *aff'd.* 530 F. 2d 964 (3d Cir. 1976) a stockholder derivative suit as against out-of-state directors of AT & T could not be brought in Pennsylvania. They had not purposely availed themselves of the privilege of the forum (*Id.* at 64):

> "A contrary ruling here would mean that any individual accepting a directorship of a national corporation would effectively be conceding *in personam* jurisdiction over himself or herself in any state with a statute similar to that of Pennsylvania. This Court believes that neither due process nor sound policy will permit such a result. Where the only occurrence in Pennsylvania is the indirect harm resulting to resident stockholders from the individual defendants' actions, the exercise of personal jurisdiction over these individuals would be both unreasonable and unconstitutional. . . ."

Even if the defendants were engaged in a commercial enterprise, the circumstances would preclude a Texas forum. Contact was initiated by the plaintiff who has a presence in the defendant's state, did enter it and contemplated expanding its operations there. The defendants never entered or contemplated entering the forum state.

Defendants have fewer contacts with the forum than the defendants in *Ursini* v. *The Menninger Foundation*, 384 F. Supp. 158 (E.D. Cal. 1974), in which the Court held that a series of letters between plaintiff in California and the defendant in Kansas were insufficient to establish jurisdiction over the defendant in California (384 F. Supp. 158, 161-2):

> ". . . plaintiff was the party initiating the contact by mail and defendant merely answered the correspondence and made further inquiry. The interchange of letters and information created no binding contract or agreement enforceable by either party, and at best may be described as preliminary negotiation. The actual business arrangements and contracts were executed in Kansas. It cannot be said that defendant purposefully availed itself of the benefits and protection of California law so as to subject itself to California's jurisdiction. *Hanson* v. *Denckla, supra.*
>
> "And even if it could be said that defendant did an act or consummated a transaction within California and that the cause of action arose as a result of the defendant's hereinabove described activities in California, this Court cannot assume jurisdiction in consonance with the due process tenets of fair play and substantial justice. To hold defendant in this case subject to *in personam* jurisdiction in California would subject every person, corporation, university, or association to California's adjudicatory power on the basis of a mere reply to correspondence which had initiated from Calfornia."

Last term this Court held that California did not have jurisdiction over the husband in a custody dispute although he had consented to his child's presence in that State after a marital separation in New York. *Kulko* v. *Superior Court*, 436 U.S. 84 (1978). This Court found that he derived no benefit from activities in the State (*Id.* at 96-7) and had insufficient contacts to justify fairly California's assertion of personal jurisdiction.

The Circuit Court's protest that its decision would provide no damaging precedent for harassment of State officials is not justified. There is nothing unique about a state regulation which affects a multistate corporation doing business in that state, although its executive officers are elsewhere. The decision below stands for the proposition that any allegedly unconstitutional state regulation of a multistate Corporation doing or seeking to do business in that State, exposes its officials to suit wherever that Corporation is located.

If Shakey Pizza, a GWU subsidiary, had filed papers to establish franchises in Idaho and Idaho teletyped a response requiring greater disclosure, under the analysis of the Court below, GWU could attack that requirement in Judge Hill's courtroom just as it did the Idaho Takeover statute. In fact, another Texas Corporation has done just that. An action is now pending in the District Court for the Northern District of Texas against Minnesota officials, enforcing their franchise law against a Texas Corporation seeking to do business in Minnesota. *Omni Industries, Inc.* v. *John R. Larson, et al.* (N.D. Tex. #3-78-1093-D). Jurisdiction and venue are asserted under the authority of the decision below.

The jurisdictional limits of the Texas long-arm statute, even when given the maximum permissible extent, cannot secure jurisdiction over Idaho or its officials acting in their governmental capacity.

C. The Securities Exchange Act Does Not Provide Personal Jurisdiction In Actions Not Authorized By Its Terms.

The Circuit Court found personal jurisdiction over Kidwell and McEldowney under § 27 of the Securities Exchange Act (15 U.S.C. § 78aa), on the theory that this action was a suit to enforce a duty under that act. That "duty" it said, was established by § 28 of the Act, which is a saving clause for state securities statutes unless they "conflict" with the federal act. The theory is that this section establishes a duty not to "conflict" with the act.

Idaho readily concedes that its statutes may not conflict with the federal act and that an allegation of conflict is actionable in a federal court. However, such a suit is brought as a suit under 28 U.S.C. § 1331, alleging a violation of the Supremacy Clause. The Securities Exchange Act, including § 28, then is authority for and evidence of the alleged conflict, but the suit is not authorized by the Securities Act. A Congressional statute is not sufficient

to invalidate a state statute. The Supremacy Clause of the Constitution of the United States is a necessary ingredient. Congress could have authorized special jurisdiction and venue provisions for such a suit, but without clear legislative intent, it should not be presumed to have done so. See *Employees* v. *Missouri Public Health Department*, 411 U.S. 279, 284-285 (1973).

For instance, in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978) decided last term, this Court found that certain Washington state statutes conflicted with the Ports and Waterways Safety Act of 1972 (33 U.S.C.S. §§ 1221-1227; 46 U.S.C.S. § 391a); but the suit was brought under the supremacy clause. The Congressional statute in that case had specific prohibitions against state regulations (33 U.S.C.S. § 1222[b]) and dealt with coastline shipping, an area of special federal concern. Nonetheless, that act of Congress was not the jurisdictional basis for the suit, although it was authority for the decision and evidence of "conflict" or lack of it.

It takes a tortuous reading of the 1934 Securities Act to find that its general authorization to institute suits against persons who deal in or issue securities could be used by such entities to sue persons who regulate those securities. Different jurisdictional considerations ought to have entered the picture before Congress is imputed to have permitted such an action. But the Court below points to no instance where a regulator was sued pursuant to the authority of § 27. Federal regulatory officials also could be alleged to have a duty established under this section. Hence, if the Circuit Court's theory is correct, they could be subject to suit wherever they telephoned, telegraphed or mailed any response to an entity subject to the Act. Yet, in its long history, we are given no instance where § 27 has been so utilized. That being so, defendant public employees could not reasonably foresee their being subject to jurisdiction in another State. The limits which due process mandates on personal jurisdiction apply to actions brought

under the Securities Exchange Act, as well. E.g., *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F. 2d 1326, 1340-1342 (2d Cir. 1972); *Keene Corporation* v. *Weber*, 394 F. Supp. 787 (S.D.N.Y. 1975).

Furthermore, there is insufficient rationale to apply the liberal jurisdiction and venue provisions and nationwide service of process to a multistate corporation as plaintiff, especially to be used to sue individuals residing and acting in only one state—a state where the plaintiff does business. Those conditions not only prevail in this case, but would exist in most cases where an individual state securities regulator is alleged to act in "conflict" (§ 28, of the 1934 Act, 15 U.S.C. § 78bb) with the Securities Exchange Act.

Yet, the purpose for the liberality of § 27 was to grant access to a local court for a plaintiff claiming to be the victim of an interstate securities *fraud*. He could bring suit in the district where the defendant took positive steps toward perpetrating the fraud (e.g., where securities were offered or sold, often in plaintiff's home district), rather than to be required to travel to the district where the corporation's executive offices were located. This remedial venue provision was intended to prevent frauds by facilitating access to the district courts, *Hooper* v. *Mountain States Securities Corp.*, 282 F. 2d 195, 205 (5th Cir 1960), *cert. den.* 365 U.S. 814 (1961):

> "The Act meant to vest jurisdiction in every district where any use of such instrumentalities of the mail or interstate commerce was of material importance to the consummation of the scheme."

Defendant McEldowney used the mail only to inform plaintiff of the Department's action and sent the letter and order to Texas as requested by plaintiff.

Defendants McEldowney or Kidwell are not accused of having committed a "fraud" or a "scheme." The facts alleged and proven at trial will not support such an interpretation. At most, plaintiffs have alleged a "conflict" (1934 Act § 28, 15 U.S.C. § 78bb; *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 [1977], *Florida Lime and Avocado Growers* v. *Paul*, 373 U.S. 132, 146 [1963]). Section 27 does not authorize a suit in which there is a "conflict" with the 1934 Act. It governs a "liability" a "duty" or a "violation."

Furthermore, this Court has held that the Williams Act does not expand the availability of federal jurisdiction to suits brought by the offeror. *Piper* v. *Chris Craft Industries*, 430 U.S. 1 (1977).

The Circuit Court's authorization of a new cause of action under the 1934 Act, is illogical, unfair to these and other potential defendants, abrasive to federal-state relations and unnecessary.

POINT II

Venue lay only in Idaho where the regulatory action occurred and where the defendants and the target company resided.

There was no defensible reason for bringing this suit in Texas. Personal jurisdiction over the defendants was available in Idaho whose District Court was the convenient appropriate forum. No question of the cause of action arising there could have been raised. The plaintiff GWU, had a presence there and had conceded Idaho's jurisdiction over the takeover. It had appeared and filed papers in Idaho which act was crucial to the claims they raised below.

In fact, an action under the federal Williams Act, the validity of which GWU champions, was properly heard there. Three days after this doubtful proceeding was begun, GWU was defending its proposed tender offer in the United States District Court in Idaho with its first-string

takeover lawyers. Yet, it persisted in continuing this action in an inappropriate forum.

GWU, a nationwide company, could have sued as easily in Idaho as at home. The majority stockholders, the two Hunt brothers, did not testify nor was their presence at the proceedings necessary. Most of GWU's witnesses were not from Texas. The only defense witness from Texas was the executive Vice-President of GWU. Indeed, the testimony of several witnesses (Strom, Heard, Parish, Dugan) who testified as to jurisdictional issues would not have been necessary if the proper forum were chosen. Certainly, much preliminary litigation could have been avoided.

It is no justification for venue in Texas that originally there were defendants from three states. Compare 577 F. 2d at 1273. None of the original defendants was from Texas. It is our position that a suit against a state official acting in his governmental capacity must be brought in the state of which he is an official. GWU's claims against each state's statute is a separate cause of action. GWU had taken the position that Idaho's interest in the control of Sunshine was superior to that of New York and Maryland, and Idaho had asserted jurisdiction. Therefore, had it sued in Idaho, GWU would have had jurisdiction over at least one set of defendants. Since those defendants were the only ones who had acted to delay the proposed tender offer, the District Court in Idaho could have protected GWU from any immediate effect of the allegedly unconstitutional statutes.

Of course, in this case, the complaints against New York and Maryland were speculative and ultimately unnecessary.

In *Turner* v. *Baxley*, 354 F. Supp. 963 (D. Vt. 1972), the Court held that Attorneys General of several States would have to be sued separately and that the exercise of

the Vermont long-arm statute would deprive them of their Constitutional rights. Yet, *Turner* made a far stronger case for Vermont's jurisdiction than GWU did to support jurisdiction in Texas. Two of the defendants (the Attorney General and an Assistant) resided in Vermont and personal jurisdiction over them was found. The other State Officials were alleged to have acted personally and improperly. Each was alleged to have engaged in a conspiracy to deprive Turner of his constitutional rights. Furthermore, the allegation of conspiracy was said to justify a unified cause of action. But the Court held that the out-of-state Attorneys General had insufficient contacts with Vermont to satisfy due process (*Id.* at 975-978), and it was reasonable for plaintiffs, interstate corporations and their principal stockholder to bring separate actions in the various states (*Id.* at 978):

> "Should the plaintiffs find that their only recourse is to bring individual actions against each conspirator in his home state, this would present no overriding hardship to them under the circumstances presented here. The plaintiffs do business in each of these states; actions are in progress or have been concluded against them in each state; plaintiffs clearly have the legal administrative and financial resources available in each forum to bring individual actions at no severe hardship to themselves. The lack of such resources was an important consideration in the contrary result reached by the Court in [*McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1958); *Travelers Health Association* v. *Virginia*, 339 U.S. 643 (1950)]."

GWU contended that delay allegedly occasioned by Idaho's Corporate Takeover Law would prejudice its proposed tender offer. Yet, GWU chose an inappropriate forum and persisted in that choice, despite the expense and delay it caused and despite the availability of an appropriate convenient forum.

The only explanation of plaintiff's choice of a forum was the hope of an unfair advantage in the District Court in Texas. Whether GWU had expected the Texas Court to be friendly or whether it had hoped to harass the defendants with expense and difficulty, plaintiff's choice of venue should have been rejected.

A. The Venue Of This Action Cannot Be Determined By Reference To Section 27 Of The Securities Exchange Act, Since It Is Not Brought Under That Act.

Establishing venue under the Securities Exchange Act is no more appropriate than resting personal jurisdiction on it. See pp. 39-42, *supra*.

The Circuit found venue because it said an act constituting a part of the "violation" of the 1934 Act occurred there. The Court said that one act which occurred in Texas was the "effect" of the regulatory activities in Idaho and cited *Travis* v. *Anthes Imperial Limited*, 473 F. 2d 515 (8th Cir. 1973) for that proposition. But *Travis* bases venue on the fact that repeated communications were received by the plaintiffs in the Eastern District of Missouri. It bolsters that argument by stating that the only place where the effects of the Canadian activity were felt was in the same district. Plaintiffs owned more than 160,000 shares of the defendant Canadian Corporation. It was the communications from the defendants which were alleged to be the fraudulent inducement to retain its stock while a corporate takeover was occurring in Canada. Furthermore, the ultimate coerced sale of plaintiffs' stock actually occurred in the forum state. Judge Godbold, distinguishing *Travis* in dissent, notes that the statement that venue lies where the effect of the conduct occurred was makeweight (577 F. 2d at 1293-1294).

In *Higelman* v. *National Insurance Co. of America*, 547 F. 2d 298, 301-302 (5th Cir. 1977), Judge Godbold, speaking for the Court, stated that jurisdiction and venue over

a violation of the Securities Exchange Act were placed where a material act or transaction constituting the violation occurred. He held that the annual premium notice sent to Alabama and the annual premium sent from Alabama *might* be such a material act.

In *Mayer* v. *Development Corporation of America*, 396 F. Supp. 917, 918-930 (D. Del. 1975) the gravamen of the complaint was admittedly false and misleading proxy solicitation material. The Court held that sending even one such mailing to Delaware was sufficient to place venue there because it was the communication itself which was false and misleading.

Each of these cases cited by the Fifth Circuit is an example of a cause of action properly brought under the Securities Exchange Act § 27. In each, the plaintiffs are holders of securities and the defendant is the corporate issuer of securities. Here, the issuer of securities is the plaintiff and State Officials, the defendants.

In *Travis* and in *Higelman*, unlike this case, the acts in the forum were repeated. In *Mayer*, the proxy statement was sent to many individuals at the same time it was sent to the plaintiff. In *Travis* and in *Mayer*, the receipt of communications sent to the forum were themselves alleged violations of the act. False and misleading communications were the frauds that they allegedly practiced on the plaintiffs which would entitle them to relief. Here, it was not the receipt of the letter of comment and order in Texas that was the alleged "violation." It was its official promulgation in Idaho.

B. Venue Over This Cause Of Action Properly Governed By 28 U.S.C. § 1391(b) Lay Only In Idaho.

Venue over this action is governed by 28 U.S.C. § 1391(b) which provides for venue where all the defendants reside or where the claim arose. The Circuit Court noted a disagreement among the commentators as to whether the claim

can arise in only one district (15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: Jurisdiction § 3806 at 28-29 [1976]) or anywhere that compulsory process on a non-resident would be proper (1 MOORE'S FEDERAL PRACTICE ¶ 0.142 [5-2] at 1430-2).

But, where defendants are State officials acting in their governmental capacity, there is no authority to place venue outside the borders of their State. See *D'Amico* v. *Treat*, 379 F.Supp. 1004 (N.D. Ill., 1974), *aff'd* 510 F.2d 976 (7th Cir. 1975); *Jones* v. *Bates*, 58 FRD 453 (N.D. Ga. 1972), aff'd 480 F.2d 805 (5th Cir. 1973); also see *NRDC* v. *TVA*, 459 F.2d 255 (2d Cir. 1972). Constitutional limitations on their actions confine them to those borders. The Courts below consistently confused the substantive allegation of extraterritoriality with procedural questions of the locus of the action. If they are correct in finding that Idaho's action had unconstitutional extraterritorial effect (but, see *Point IV, infra*), the substantive result would be to restrain Idaho within its own borders as the Constitution requires. Nonetheless, the void extraterritorial order would have issued from the only place it could have—within the State of Idaho and only there could the claim arise. At the very least, federal recognition of comity to the States requires this interpretation.

There might have been a reason for trying to place venue outside Idaho if an out-of-state stockholder was seeking to tender his shares and attacked the extraterritorial impact of the Idaho decree. But, where the plaintiff is a multistate corporation and the cause of action involves its attempt to take over control of an Idaho corporation, the placing of venue outside Idaho is unjustified. Arkansas venue was upheld where an Illinois corporation thrust itself into Arkansas affairs. *Gardner* v. *Page*, 484 F.2d 27 (8th Cir. 1972).

Yet, the Circuit Court held that the claim arose only in Texas, betraying a lack of appreciation of the nature of

GWU, its tender offer and the record before it. GWU is located all over the United States, not only in Texas. At the time of trial it still had corporate headquarters in Colorado and substantial assets in Colorado and Nebraska. It was organized in Delaware. Its stock was traded on the New York Stock Exchange. SEC form 10-K, GWU (1975).

The record makes clear that the proposed tender offer was intitiated in New York, not Dallas, as the Circuit Court stated. Indeed, the filings under the Federal Act and the Idaho Corporate Takeover Act were prepared in New York and transmitted to the SEC and defendant McEldowney from New York. The stocks were to be tendered to a bank located in Chicago, Illinois. Proposed Tender Offer (3/21/77). Lastly, it was GWU's Idaho operation which was affected by the Idaho statute.

Even this seemingly innocuous portion of the Circuit Court's opinion provides dangerous procedural precedent. It holds, for the first time, that venue over a claim against state officials acting in their governmental capacity can lie in another state. It also holds that claims affecting a multistate corporation arise only where the corporation's executive offices are located, even if the claims involve its business in another forum.

Compare *ITT Thorp Corp.* v. *Fireman's Insurance Co. of Newark, New Jersey*, 428 F. Supp. 62 (E.D. Wis. 1977), in which venue was placed in Iowa where defendant's employee committed his allegedly dishonest action and *Trans-America Corp.* v. *Transfer Planning*, 419 F. Supp. 1261 (S.D.N.Y. 1976), in which defendant's communication to and minimal contacts with New York did not support venue there.

POINT III

There is no conflict between the Idaho Corporate Takeover Law and the federal Williams Act, both of which seek to protect the stockholders in the target company.

The cash tender offer or corporate takeover bid is a relatively new method for obtaining control over a corporation. While it began to be used in the 1960's (BARTELL 205-206), the frequency of such offers has escalated since 1973 (CHATLOS 285).

Thus in 1970, when Congress passed the Williams Act there was not sufficient experience to enable it to enact the carefully constructed regulatory mechanism which the Courts below thought it to be. Manuel F. Cohen, then Chairman of the SEC, said ("Senate Subcommittee Hearings") "This is a developing area, one that is developing rather rapidly, and our understanding and experience is being enhanced every day and with every new takeover bid." (Senate Hearings,* 15). The SEC wished to be given flexible enforcement "tools to deal effectively with the various techniques that have been developed, and are continuing to be devised, to seek or to prevent takeover bids . . ." (Senate Hearings, 33).

Unlike the drafters of the Securities Act of 1933 and the Securities Exchange Act of 1934 who could draw upon the experience of state regulation of securities under the well-established "blue-sky" laws of the time, the 90th Congress had no such well-spring knowledge concerning cash tender offers to draw upon.

That experience is being gained right now in what Justice Brandeis would call "laboratories" (see *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) [dissent])—

* Hearings on S.510 Before the Subcommittee on Banking and Commerce, 90th Cong., 1st Sess. 15 [1967].

the offices of securities administrators in the 36 states which regulate takeovers, as well as in the SEC and Congress. Congress has expressed no intent to exclusively occupy the field of securities regulation, in general or of corporate takeovers, in particular. Both are governed by the permissive section 28(a) of the Securities Exchange Act of 1934. But the Court of Appeals found that the Idaho statute conflicted with the federal Williams Act and thus was invalid under the Supremacy Clause.

A. The Idaho Corporate Takeover Law Complements the Williams Act In Protecting Shareholders Of The Target Company.

GWU's proposed tender offer was, by its own terms and as governed by the Williams Act and the Idaho Corporate Takeover Law, a unitary transaction to obtain working control of Sunshine, heretofore a widely held corporation. Its offer, at a very small premium, was to purchase up to two million shares of Sunshine common stock. It already owned 334,070 shares, the largest block of the 5,800,000 shares outstanding.

The offer had been prepared uniltaterally by GWU in secret and without negotiation, sprung on the management of Sunshine on March 18 and 3 days later announced to the public on March 21. Under the Williams Act all holders of Sunshine's common stock would have had to evaluate the information available and make their investment decisions in 10 days, by March 31. This would be true even if the disclosure of pertinent information were insufficient to satisfy the requirements of the Williams Act, since there would be no administrative review before the offer was made.

It is necessary for a shareholder to be given all relevant information about the offer and a sufficient opportunity to evaluate that material.

Inevitably caught by surprise, shareholders of a target company must decide whether to (1) tender their shares, (2) sell their shares on a securities exchange, or (3) hold their shares. If the shareholders tender their shares without adequate notice they may lose the opportunity to sell later to a subsequent bidder at a higher offering price or to hold them to realize greater profit. If they sell their shares on a securities exchange at a premium usually offered by arbitraguers, they would miss the opportunity to sell at the higher tender offer price, to sell at an even higher price to a competing bidder or to hold them. If they hold their shares they may miss all of the short run opportunities for profit. See Senate Hearings 2.

These decisions affect the economic well-being of the shareholder and may involve a substantial portion of his assets. If his decision to make the initial investment involved careful analysis of the market and of the company in which he entrusted his assets, he is certainly, during a "Saturday Night Special", robbed of the opportunity for clear and careful decision. A shareholder who has determined to hold his shares for a long term is pressured to sell against his previously determined interests because he now lacks information as to the future policies of the company.

Many stockholders do not regularly trade their shares; but retain their interest in particular companies (CHATLOS, T 361-362, 5/24/77). It would have been reasonable for the Idaho Legislature to have found that the State in which a company has its principal place of business and substantial assets would have a concentration of such investors. Founders, their friends, family and heirs are apt to reside there. Officers and former officers and their family and friends are likely to be stockholders. Employees, former employees, pension and other employee benefit plans are also likely to have bought stock in such a company. Customers, suppliers, their employees and agents, also are likely to be stockholders within that state. Citizens of the

local community would be more likely to buy and hold the target company's stock. Such stockholders have a particular dilemma. They might wish to hold their stock, but it probably would now be in the control of new parties with different policies. Virtually all target companies lose their independence when a tender offer is proposed (CHATLOS, T 328-30, 5/24/77). If a shareholder cares about the policies of the company he owns because of personal connection or as a public spirited citizen, he is forced to decide between economic protection and these interests without the information to decide either issue.

1. The Williams Act

Congress, in the Williams Act, sought to alleviate the stockholder's confusion and provide him with certain protections. First it required disclosure of information material to a security holder's decision, including details about the offeror and about his plans in a schedule 14D-1.* 2 Fed. Sec. L. Rep. (CCH) ¶ 24,284C at 17, 715-17, 718. All other persons making recommendations or solicitations must also file 14D disclosure statements. Material information filed in the offeror's 14D statement must be transmitted to the shareholder along with the offer (15 U.S.C. § 78n[d][1]).

The Williams Act also guarantees the shareholder some time to make up his mind. The offer must stay open for at least 10 days* and the shareholder may withdraw his tendered shares in the first seven or after 60 days if the offeror has not yet purchased them. 15 U.S.C. 78n(d)(5). If more securities are received than are accepted, each individual tendering receives a *pro rata* share back. 15 U.S.C. § 78n(d)(5). Because of this provision, even a

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* At the time of trial it was designated a 13D statement.

* The SEC has just proposed extending that period to 30 days. SEC Release Nos. 33-6022; 34-15548, IC-10575; file No. S-7770 (17 CFR Part 240) TENDER OFFERS Proposed Rules Schedule (2/5/79).

tendering shareholder has to evaluate the offeror and his plans because he may continue to own stock in the company it controls. The Williams Act further promotes equality among the shareholders by mandating any increase in the offer be paid to all shareholders whose tendered shares were purchased. 15 U.S.C. § 78(n)(d)(7).

A broad antifraud provision prevents false and misleading statements and fraudulent manipulative practices by any person regarding an offer. 15 U.S.C. § 78n(e).

2. The Idaho Statute

The Idaho statute also was designed to protect the target company's shareholders. Like the Williams Act, the Idaho statute requires the filing of material information affecting the offer. (Idaho Code § 30-1502, 1503[c]-[d]),—that information must be made public and served on the target company (Id. § 30-1503[i]).

The most significant distinction between the Idaho statute and similar state statutes, on the one hand, and the Williams Act, on the other, is the provision for administrative review before the offer is made if the shareholders' elected representatives acting in their fiduciary capacity have not recommended the offer (Idaho Code § 30-1503 [1], [3]-[4]). Some state statutes, like New York's (NYBCL § 1602), have a waiting period after filing before the offer is made, but Idaho's law imposes no predetermined amount of time. It does, however, affirmatively charge its State Finance Director with a duty to review the filing and the offer cannot be made until he approves it (Idaho Code § 30-1503[4]).

3. The Idaho Security Administrator's Letter Of Comment Was Consistent With The Williams Act Disclosure Requirements.

Since this was the first filing in Idaho, there is insufficient experience to support a finding that review under this statute would unreasonably delay the tender offer. It can

be said that in this instance the securities administrator acted promptly (Baptie, T 380-407, 5/24/77). His letter of comment (Boswell 77-85) sent four days after the filing dealt only with facts material to the shareholders' decision and ones which should have been filed with the Securities and Exchange Commission. 17 CFR 240.13D-101 (superseded by 17 CFR 240.14D-100).

Baptie required GWU to supply missing portions of the schedule 13D filed with SEC to correct misstatements as to the effect of Idaho law to eliminate a misleading phrase that it would be a "risk" to Sunshine's shareholders, if GWU were to be willing to purchase all shares and to clarify the phrase "working control" which was crucial for the shareholders because that was identified as GWU's objective in making the tender offer. In all these respects, the state administrator was vindicating the requirements of the Williams Act as interpreted in the regulations of the SEC. Those requirements could have been easily complied with.

Idaho's statute requires full disclosure of the future plans of the offeror—information without which an informed investment decision cannot be made (Idaho Code § 30-1502 [c]):

> "If the purpose of the acquisition is to gain control of the target company, a statement of any plans or proposals which such person has, upon gaining control, to liquidate the target company, sell its assets, effect its merger or consolidation, or make any other major change in its business, corporate structure, management or personnel."

The SEC also requires that disclosure in even more detail. (240.14d-100). Baptie requested disclosure of the impact of the issuance of Sunshine's authorized stock or of the sale of its subsidiaries. These requests were not in conflict, but in conformity with the Williams Act.

Idaho's statute requires disclosure as to the organiza-

tion operations and finances of the offeror (Idaho Code §§ 30-1502[1], 1503[2c-d]).

The SEC requires financial statements which would ordinarily be on file already, such as those in conformity with form 10 (17 CFR 249.219) for domestic corporations. 17 CFR § 240.14d-100 Item 9.

Baptie requested GWU to provide information as to its stock, debts, principal properties and plans to recapitalize. That information could have been readily supplied as it should have already been on file with the SEC.

Idaho's statute requires rather complete disclosure of the offeror's past relations with the target company or its stockholders. It requires disclosure of the method of financing the offer.

The SEC requires exhaustive disclosure (17 CFR § 240.14d-100, Items 3-4, 6, 7 and 8) of relations between the offeror and target company and its current interest in the securities of the target company. These include, for instance, all "contracts, arrangements, understandings or relationships with respect to the [Target] company's securities" (*Id.* Item 7). It also requires information as to the method of financing the offer (*Id.* Item 4).

Baptie requested disclosure of GWU's relations with Hecla and Silver Dollar, their litigation with Sunshine, and the financial arrangements for the offer. This request was for no more than should have appeared in the SEC filings. His requests were not in conflict with the Williams Act.

The Idaho statute requires that all of the target company's shareholders be treated on "substantially equal terms" (Idaho Code § 30-1503[5]).

The Williams Act requires that all tendering shareholders be paid at the highest price paid any of them (15 U.S.C. § 78[n][d][7]) and that shares be prorated, if the offer is over-subscribed (*Id.* subsection 6).

Baptie raised the question whether GWU's agreement to pay Hecla's and Silver Dollar's unsuccessful proxy fight expenses was an additional payment for their block of shares in Sunshine. GWU failed to respond to that or any other matters in the letter of comment. The same claim, this time under the Williams Act, was raised by Sunshine and ultimately rejected by the District Court in Idaho (52-54).

Baptie's question did not conflict with the Williams Act.

In suggesting that Baptie's letter was unreasonable (577 F. 2d at 1263-1264), the Court below trivialized the disclosure requirements of the Williams Act. Congress determined that the disclosure of material information was necessary to enable the prudent investor to make a reasioned decision when confronted with a tender offer. E.g. 173 Cong. Rec. 854 (1967), cited in *Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 26 (1977). The state administrator's function was to make sure that that duty is enforced.

B. State Administrative Review Promotes Compliance With Both State And Federal Requirements.

Theoretically, pre-offer review extends the time between the announcement of the proposed tender offer and its consummation (see decision below 577 F 2d at 1277-1279). As a practical matter, it is not clear that the state administrator's examination actually adds to the delay of most tender offers. Because the SEC ordinarily does not review the material filed under the Williams Act, it is standard operating procedure for an antagonistic target company to sue the offeror for failing to comply.* See *Wheat*, T 270,

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* In contests for corporate control preliminary is preferable to post-control relief, e.g. *Electronic Specialties Co.* v. *International Controls Corp.*, 409 F.2d 937, 947 (2d Cir. 1969), cited with approval in *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 41-42 (1977).

5/24/77, LIPTON & STEINBERGER, *Takeovers and Freezeouts*, p. 304 [1978]). Even if there has been no violation of the Williams Act and full disclosure has been made, the target company always has at least three powerful arguments to obtain delay in the Federal Court. The first is the shortness of time to examine the filings or secure other facts before the tender offer is open or before it is completed. Secondly, the spectre of "irreparable injury" (FRCP Rule 65[b]) is the constant companion of the target company. In 10 days it will cease to exist, unless sustained temporarily by a District Court order. Third, the availability of liberal discovery can be used by the target company as a shield or a sword. It can seek information necessary to evaluate the offer, as, for instance, Baptie did in his letter, or it can seek to harass the offeror and delay the offer.

It is difficult for a District Court to refuse to give the target company some time to explore the validity of the offer and the sufficiency of disclosure. Ten days is an unrealistically short time for important business decisions such as this to be made (WHEAT 259-261; CHATLOS 287-288). The Idaho Court granted a temporary restraining order against this offer for 22 days—from April 1 to April 22, 1977, a fact pointedly left out of the Circuit Court's speculation as to the speed with which the Williams Act would have permitted the takeover. The Fifth Circuit stated that the Idaho Court had denied a preliminary injunction; but it omitted the fact that an extended temporary restraining order had been granted. 577 F. 2d at 1263, including n. 11.

If an independent state administrator had evaluated the disclosure by the offeror, the first and third arguments of the target company for temporary relief might be weaker. Furthermore, if a more reasonable length of time is permitted by the State statute, the target company's Williams Act case will diminish, unless substantial non-compliance can be demonstrated.

The basic difference between the Williams Act and the Idaho Corporate Takeover Law is that under the latter, an independent state administrator reads, evaluates and checks the disclosure statement, assuring its completeness, clarity and accuracy, while the Williams Act leaves it to the target company in show-cause-order-litigation to identify deficiencies in the offering statement. It is the state statute which provides for neutrality in the person of an objective public administrator. It is the SEC which leaves the enforcement of its disclosure provision to the antagonistic parties. Compare decision below 577 F. 2d at 1278-1280.

The Idaho law permits the Finance Director to order a hearing on compliance with its provisions and requires him to do so if demanded by the target company. That requirement is criticized on two grounds—that it gives an unfair advantage to the target company and that it delays the offer.

C. The Idaho Law Offers Little Protection For The Target Company, But It Does Promote A Market For The Benefit Of The Shareholders

The Court below found that Idaho had given the target company too much ability to defeat the offer. William Chatlos (283-284) demonstrated without contradiction that target companies do not survive, whether there are state statutes or not. They cease to exist as independent companies. They are doomed by the offer—or, more likely, by the market conditions which produced it (WHEAT 263-265; CHATLOS 285-287).

The claim that target companies are given an unfair advantage by this or any state takeover law is a red herring used by offerors to defeat the open corporate auction market which the Williams Act and state laws similar to Idaho's promote (WHEAT 262-263; CHATLOS 283-288).

Idaho made no effort to protect "entrenched management." E.g. Senate Hearings at 134, 178-179. The District

Court found that Sunshine had not influenced Baptie's actions in any way. 439 F. Supp. at 424 n. 4. Sunshine's principal corporate officers did not reside in Idaho, but in New York and Colorado. They were unlikely to receive much unfair advantage at the hands of Idaho officials due to their callous denial of responsibility for the fire in the mine and resistance to the miners' demands which resulted in the lengthy strike.

However companies with enlightened management more often are the targets for takeovers since the key usually is a low price-earnings ratio. High earnings are not the earmark of entrenched management. In a recent large takeover of Carrier Corp. by United Technologies Corp., Harry Gray, President of the offeror repeatedly stated that he was attracted to Carrier by its excellent management. *In the Matter of Takeover Bid By United Technologies Corporation for equity securities of Carrier Corporation* (Order and decision of the Attorney General of the State of New York, Bureau of Securities, 11/10/78). It is the target company, as an independent entity that is doomed. Whether the enterprise will continue or be "raided"* depends on the offeror. The shareholder must be able to evaluate the offeror and its plans.

The offeror attacks the target company, but what it really fears is a new and higher bidder. Yet, it is the appearance of the subsequent bidder which signals the market that

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* See this Court's reference to Senator Kuchel's discussion in *Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 28 (1977):

> "'Today there are those individuals in our financial community who seek to reduce our proudest businesses into nothing but corporate shells. They seize control of the corporation with unknown sources, sell or trade away the best assets, and later split up the remains among themselves. The tragedy of such collusion is that the corporation can be financially raped without management *or shareholders* having any knowledge of the acquisitions. . . . The corporate raider may thus act under a cloak of secrecy while obtaining the shares needed to put him on the road to a successful capture of the company.' 113 Cong. Rec. 857-858 (1967). (Emphasis supplied.)"

favors the shareholder. See the decision below 577 F. 2d 1276, 1277. Also see WHEAT 263-266; CHATLOS T. 329, 5/24/77; CHATLOS *The SEC* v. *Investors on tender offers*, Harv. Bus. Rev., Sept.-Oct. 1978. The geometric explosion in the number of tender offers since 1973 has coincided with the increase in the number of state statutes regulating them. It does not appear that tender offerors have been deterred by the state laws, although they may encourage more bids. It was not the purpose of Congress to guarantee success for the first offeror—it was the creation of a market that Congress was promoting. CHAIRMAN COHEN, Senate Hearings 184. If undue speed is permitted the offeror and careless compliance with disclosure requirements, countenanced, that potential bidder will be preempted. This Court should not protect the offeror from that market.

There can no longer be any doubt that the 10 days for an offer to be open is an unrealistically short period to protect investors. Congress prevented an offer from being completed in less than 10 days by its requirement that all shares tendered in 10 days must be prorated. 15 U.S.C. § 78n(d)(6). The SEC has the power to increase that minimum at least to 60 days. 15 U.S.C. § 78n(d)(5) and it has now proposed an increase to 30. See note on p. 55, *supra*.

The longer it is before the offer is completed, the more likely that the shareholder will receive fair value for his stock (CHATLOS 285-287; Also see *Chatlos op. cit.* Harv. Bus. Rev.

The right of a target company to require a hearing provides some check on the State Administrator, but the length and conduct of that hearing are within his control;*

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* New York has had one hearing under its statute (a target company cannot require it to be held) and that hearing lasted only 2 days, but was attended by many shareholders and their representatives. The decision permitting the amended filing was rendered in less than 60 days. Thereafter the Justice Department

(footnote continued on following page)

Baptie undertook to expedite the hearing in this case. The Idaho statute requires that a hearing be held within 20 days and the decision made within 30 of the filing, although the latter limit can be extended by order of the Director. On its face, the Idaho statute does not contemplate a lengthy hearing. This record does not support a finding that the defendants delayed GWU's offer in such a way as to conflict with the Williams Act.

The purposes of the Idaho statute and the Williams Act are the same—to protect investors. *Piper* v. *Chris-Craft Industries,* 430 U.S. 1 (1977). The Court below ignored the holding of this Court in exaggerating Congress' solicitude for the offeror. Congress, like the Idaho legislature, was concerned for the stockholder of the target company. Neither statute sacrifices his interest to either the target company or the offeror. Therefore no impermissible interference with, or conflict between, the statutes exists and the state law should be sustained, *e.g., Jones* v. *Rath Packing Co.,* 430 U.S. 519, 531-32, 543 (1977); *Perez* v. *Campbell,* 402 U.S. 637, 652 (1971); *Castle* v. *Hayes Freight Lines, Inc.,* 348 U.S. 61, 64 (1954); *Franklin Nat'l Bank* v. *New York,* 347 U.S. 373, 378-79 (1954).

D. The Idaho Corporate Takeover Laws Is Valid Under the Supremacy Clause

In *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware,* 414 U.S. 117 (1973), this Court held (*Id.* at 127):

> "We may not overlook the body of law relating to the sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties. Our analysis is also to be tempered by the conviction that the proper approach is to reconcile

(footnote continued from preceding page)

obtained litigation stays against the offer on alleged anti-trust grounds, although a preliminary injunction was denied. *United States* v. *United Technologies Corporation* (N.D.N.Y. 78 Cir. 580).

> 'the operation of both statutory schemes with one another rather than holding one completely ousted.' " (Quoting *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357 [1963]).

The Court found that there was no conflict between a State statute and a New York Stock Exchange Rule authorized by the Securities Exchange Act of 1934.

The Court below correctly recognized that Congress had not chosen to exclude the states from regulating tender offers, since nothing in the Williams Act Amendments suggest that it was altering the saving clause, § 28 of the 1934 Act, which authorizes State regulation of securities. 577 F.2d at 1275. But in equating differences between the state and federal statutes with an impermissible conflict, the Court of Appeals failed to apply the proper standard as enunciated by this Court in *Florida Lime and Avocado Growers* v. *Paul,* 373 U.S. 132, 142 (1963), in upholding the California Agricultural Code against a claim that it was pre-empted by the Federal Agricultural Marketing Agreement of 1937:

> "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.
>
> The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained."

It is possible that some state statutory provision or administrative action might be found to conflict with the

Williams Act, but the Idaho statute on its face and as administered by appellant McEldowney advanced the purposes of the Congressional legislation.

POINT IV

Idaho has a compelling local interest in insuring the orderly restructuring of a corporation principally located there and in guaranteeing its investors the information necessary to protect themselves. These strong interests outweigh incidental effects on interstate commerce.

The Idaho Corporate Takeover Law affirmatively guarantees equality of treatment for all shareholders in the target company. Idaho Code § 30-1503(5). It makes no distinction between investors within and without the State. Since the law does not discriminate against out-of-state goods or residents, it is not invalid *per se* as a restriction on interstate commerce. Compare *City of Philadelphia* v. *State of New Jersey*, —— U.S. ——, 57 L.Ed. 2d 475 (1978), which invalidated a New Jersey statute prohibiting the importation of out-of-state waste.

Non-discriminatory statutes which burden interstate commerce are governed by this Court's standard announced in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> "Where the statute regulates evenhandedly to effectuate a legitimate local interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

Applying the *Pike* test the Court of Appeals held that the Idaho law interfered with securities transactions throughout the country and might conflict with the laws of other states. These burdens, the Court said, outweighed the

benefit which it found to be a minimal one of protecting resident shareholders. It is the position of the *amici curiae* that the Court of Appeals unjustifiably discounted Idaho's legitimate concern with the governance of corporations operating principally within that state and exaggerated the interference in interstate commerce occasioned by the regulation of tender offers.

A. Idaho's Corporate Takeover Law Vindicates Legitimate Local Public Interest.

The tender offer proposed by GWU would, in one transaction, take control of Sunshine, a corporation whose principal place of business and substantial assets are in Idaho. In the short run, it would leave the majority of shareholders who had owned stock in a widely held corporation as owners of a corporation responsive to one powerful shareholder. In the long run it would make them shareholders of a new corporation, one which was suspicious of disclosing too much about itself and one controlled by a powerful family.

This corporation's assets in Idaho consist largely of real property including the largest silver mine in Idaho or the United States. So this corporation which was being reorganized owned important parts of the State itself, and controlled its precious resources.

This Court has recently recognized the appropriateness of state security laws, even for the benefit of a defeated offeror. (*Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 41 (1977)):

> "Despite the pervasiveness of federal securities regulation, the Court of Appeals concluded in this case that Chris-Craft's complaint would give rise to a cause of action under [state] law principles of interference with a prospective commercial advantage. Although Congress is, of course, free to create a remedial scheme in favor of contestants in tender

offers, we conclude . . . that 'it is entirely appropriate in this instance to relegate [the tender offeror] and others in [that] situation to whatever remedy is created by state law.' "

It also has refused to imply federal causes of action in the traditional state domain of internal corporate affairs. *Sante Fe Industries* v. *Green,* 430 U.S. 462 (1977); *Cort* v. *Ash,* 422 U.S. 66 (1975).

In *Santa Fe Industries,* this Court deferred to Delaware's "short form merger statute", citing language in *Cort* v. *Ash* (*Id.* at 84) which may guide us here:

> "Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation."

In the face of this permissive federal policy and strong local interest, the Court below nonetheless found that only Congress could regulate this commerce. It suggested that the Idaho defendants' actions were to advance chauvinistic protection of incumbent management and to prevent the removal of local business to other states (577 F.2d at 1282). But neither of those findings is justified. Incumbent Sunshine management had no champion in Idaho officials p. 58 *supra.* Certainly no Idahoan feared the removal of the target Company's operations from that State. Even the wealth and power of the Hunts could not move the Sunshine Mine to Texas. Idaho's interest was just what it had asserted—to provide information and the opportunity to use it to the owners of Sunshine. Its purpose was to insure the orderly restructuring of the company and to protect the rights of those owners, Sunshine's shareholders.

The Court below erred in measuring Idaho's interest by the number of shareholders residing there. While the

Idaho Legislature could reasonably expect a concentration of a corporation's shareholders to be located within its borders if the corporation had its principal place of business in Idaho, the focus of its local interest is the corporation. Its concern for this Idaho corporation reflects itself in protection of its shareholders in tender offer transactions where their ownership of the corporation is at stake. Idaho's law guarantees that all shareholders, wherever they reside, will be equally protected.

The Court below failed to appreciate Idaho's solicitude for the owners of its local industry because it wrongly believed (577 F.2d at 1280, n. 53):

> ". . . a tender offer involves the sale of securities from one shareholder to another, not a change in the corporation itself."

It also did not recognize that federal and state laws protected the shareholder of the target corporation, whether or not he decides to tender all or part of his stock or whether he receives it back because of proration. See Chairman Cohen, Senate Hearings 206. The Court wrongly believed that only the tendering shareholder deserved consideration (577 F.2d 1280, n. 53):

> "Although a tender offer can be a substitute for a proxy contest, there are important distinctions between the two. In a proxy contest the existing shareholder transfers only his vote; the other aspects of his existing relationship with the corporation remain. A tendering shareholder severs the existing relationship completely."

The Court of Appeals even suggested that disclosure might be harmful to interstate commerce, by "confusing" the shareholder. 577 F.2d at 1268. In light of the Williams Act that was impermissible speculation.

Idaho has demonstrated a compelling local interest in the restructuring of Sunshine. This interest is based on the

actual location of Sunshine, not its place of incorporation. Sunshine is "a pseudo-foreign corporation" to Idaho. See Kaplan, *Foreign Corporations and Local Corporate Policy,* 21 Vand. L. Rev. 433 (1968); Latty, *Pseudo-Foreign Corporations,* 65 Yale L.J. 137 (1955). One major advantage of this jurisdictional base in the area of tender offers is that incumbent management cannot choose a state to protect it from a takeover bid as it might have if those bids were governed exclusively by the State of incorporation.

B. The Idaho Corporate Takeover Law Has Only An Incidental Effect On Inter-State Commerce.

Exercising jurisdiction over the corporation actually located in the state and treating all Sunshine shareholders equally, Idaho law will affect Sunshine shareholders tendering their shares to the offeror, even if those shareholders reside elsewhere. That is the necessary ancillary effect of vindicating a legitimate local concern. This Court has upheld the extraterritorial application of Virginia's Blue Sky Laws to the issuance of insurance policies on those grounds. *Travelers Health Association* v. *Virginia,* 339 U.S. 643 (1950).

The condemnation by the Court below of the alleged extraterritorial effect of Idaho's Corporate Takeover Law was answered eloquently by the then Judge Cardozo in 1915 in applying a New York law permitting recovery by a corporation of illegal dividends by its Board of Directors. The place of incorporation was New Jersey, but its main business was in New York. Judge Cardozo held that New York law governed the payment of dividends to out-of-state shareholders without offending the Commerce Clause (*German-American Coffee* v. *Diehl,* 216 N.Y. 57, 64):

> "This statute makes no attempt to regulate foreign corporations while they keep within their domicile. It is aimed against them only while they elect to live within our borders. The duty which it imposes arises only when they come to us, and ends the moment that they leave us. Such a statute, however phrased, is in effect a condition on which the right to do business within the state depends. . . .
>
> "If they take the corporation out of the state, they may declare dividends as they please. If they elect to keep it with us, they must not lead it into paths of ruin. In these days, when countless corporations, organized on paper in neighboring states, live and move and have their being in New York, a sound public policy demands that our legislature be invested with this measure of control. If the control is irksome, it may be avoided by leaving us. Even if the prohibited act is done in the home state, it may be bound up in its results with the business in this state that we cannot view it with indifference."

Because of different state jurisdictional bases and because certain corporations could have a dominant presence in more than one state, it is possible that more than one state might invoke jurisdiction over a tender offer. However, there is every reason to expect that there would be cooperation in acceding to the authority of the State most concerned (WHEAT T 311, 5/24/77).

There has not yet been an instance where more than one state has stayed an offer, held a hearing or affirmatively proceeded where another state had acted. The suggestion that three states governed this offer was GWU's, alone. It was a transparent litigation device to bolster its Commerce Clause claims and to avoid disclosure of its finances. However from the first, the officials of New York and Maryland cooperated completely in defending Idaho's jurisdiction. They evaluated Idaho's statute and administrative action and determined that the investors' interests were being protected, even if they had jurisdiction.

Where the interstate effect was ancillary and beneficial this Court upheld a Maryland law creating a bounty for auto bodies to be paid to scrap processors in the state.

Hughes v. *Alexandria Scrap Co.*, 426 U.S. 794, 808-809 (1976). Here too, the ancillary and beneficial effects on non-residents and speculation as to possible conflict among the states is outweighed by Idaho's legitimate local public interests in regulating the dramatic restructuring of a local corporation by means of a tender offer and in protecting its shareholders.

CONCLUSION

For all the foregoing reasons, the decision of the Court of Appeals for the Fifth Circuit should be reversed and the complaint dismissed.

Dated: New York, New York
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FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1978

DAVID H. LEROY, ATTORNEY GENERAL OF IDAHO AND TOM D. MCELDOWNEY, DIRECTOR OF THE DEPARTMENT OF FINANCE OF THE STATE OF IDAHO, APPELLANTS

v.

GREAT WESTERN UNITED CORPORATION

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

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Stafford v. *Briggs*, cert. granted, No. 77-1546 (Jan. 15, 1979)	2
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E. Aranow and H. Einhorn & G. Berlstein, *Developments in Tender Offers for Corporate Control* (1973) 56, 61

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M. Cohen, Address to the American Society of Corporate Secretaries, Inc. (June 28, 1966) 48
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Exchange Act Release No. 34-13787, 42 Fed. Reg. 38341, 38345 (1977) 56
Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 Texas L. Rev. 1 (1978) 25, 32
Hearings on H.R. 4285 and S. 3431 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. (1970) 51
Hearings on H.R. 14475 and S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess. (1968) 51
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Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. (1967) 43, 49, 55-56
Henry, *Activities of Arbitrageurs in Tender Offers*, 119 U. Pa. L. Rev. 466 (1971) 35
Horowitz, *The Commerce Clause as a Limitation on State Choice-of-Law Doctrine*, 84 Harv. L. Rev. 806 (1971) 29
H.R. 4285, 90th Cong., 2d Sess. (1970) 51
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O'Boyle, *Changing Tactics in Tender Offers*, 25 Bus. Law. 863 (1970) 35
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S. 510, 90th Cong., 1st Sess. (1967) 43, 49
S. 2522, 95th Cong., 1st Sess. § 3 (1975).. 52
S. 2731, 89th Cong., 2d Sess. § 2 (1966).. 47, 48
S. Rep. No. 550, 90th Cong., 1st Sess. (1967) 5, 43, 45, 50, 58, 59
S. Rep. No. 91-1125, 91st Cong., 2d Sess. (1970) 51-52
Sommer, *The Ohio Takeover Act: What Is It?*, 21 Case W. Res. L. Rev. 681 (1970) 35
Sowards & Mofsky, *Corporate Takeover Bids: Gap in Federal Securities Regulation*, 41 St. John's L. Rev. 499 (1967) 48
Stock Exchange Practices: Hearings on S. Res. 84 (72d Cong.) and S. Res. 56 and S. Res. 97 (73d Cong.), pt. 15, National Securities Exchange Act of 1934, Before the Senate Comm. on Banking and Currency, 73d Cong., 1st Sess. (1934) 39
Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 Fordham L. Rev. 1 (1976).. 34

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-759

DAVID H. LEROY, ATTORNEY GENERAL OF IDAHO AND TOM D. MCELDOWNEY, DIRECTOR OF THE DEPARTMENT OF FINANCE OF THE STATE OF IDAHO, APPELLANTS

v.

GREAT WESTERN UNITED CORPORATION

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

QUESTIONS PRESENTED

The Securities and Exchange Commission will address the following questions: [1]

[1] The two questions set out here comprise questions six to nine of the jurisdictional statement. Because the principal concern of the Commission is with the interaction between

1. Whether the Idaho Corporate Take-Over Law is invalid under the Commerce Clause because it creates an undue burden on interstate commerce.

2. Whether the Williams Act, 15 U.S.C. 78m(d)-78m(e), 78n(d)-78n(f), conflicts with the Idaho Corporate Take-Over Law, so that the state law is preempted under the Supremacy Clause of the Constitution.

---

state and federal law, we do not address whether this suit should have been brought in a federal court in Idaho rather than one in Texas (questions one to five of the J.S.) or whether a tender offeror has standing (question 10). One of the objections raised by appellants to federal jurisdiction in this case is that *Shaffer* v. *Heitner*, 433 U.S. 186 (1977), and similar cases preclude a federal court from exercising personal jurisdiction over defendants who do not have substantial contacts with the state in which the federal court sits. The court of appeals apparently adopted this framework for the analysis of issues under the Texas long-arm statute and Section 27 of the Securities Exchange Act, 15 U.S.C. 78aa. The United States has argued, however, that *Shaffer* and similar cases have no application to questions about the jurisdiction of the federal courts, because the federal government constitutionally can exercise sovereignty over all of its residents. See the brief for the United States as amicus curiae in *Stafford* v. *Briggs*, cert. granted, No. 77-1546 (Jan. 15, 1979). See also *Fitzsimmons* v. *Barton*, 589 F.2d 330 (7th Cir. 1979). For the reasons stated there, the United States believes that there is no serious question about the constitutionality of the assertion of federal jurisdiction here, if a statute authorizes such personal jurisdiction. (We have furnished copies of the brief for the United States in *Stafford* to counsel for the parties in this case.)

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission is responsible for the administration and enforcement of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78a *et seq.*, of which the Williams Act is a significant part. Congress enacted the Williams Act in 1968 to regulate corporate acquisitions by tender offers, and the Williams Act established a requirement of full disclosure as the means of protecting investors.

This case concerns the application of the Idaho Corporate Take-Over Law, Idaho Code § 30-1501 *et seq.* (Supp. 1978), to a tender offer that is also subject to the provisions of the Williams Act. Although the Commission and the states cooperate in administering statutory systems that preserve the states' traditional regulation of securities transactions within their own borders, the Idaho Corporate Take-Over Law represents a substantial departure from the traditional form of state regulation. As the agency principally responsible for the achievement of the goal of investor protection embodied in the Williams Act, the Commission has a substantial interest in the application of any potentially conflicting state scheme for the regulation of tender offers, and also has a substantial interest in the question whether particular state securities laws with extraterritorial effects impose undue burdens on interstate commerce.

STATEMENT

1. This action arises out of efforts by Great Western United Corporation ("GWU"), a publicly-owned company incorporated in Delaware, with offices in Dallas, Texas, to purchase common stock of Sunshine Mining and Metal Co. ("Sunshine"), a Washington corporation that has its principal executive offices and more than half its assets in Idaho (J.S. App. A-4, A-5, A-31).[2] Sunshine also has a manufacturing subsidiary located in Maryland, and it engages in substantial business activities in the state of New York (J.S. App. A-4). Less than three percent of its shareholders live in Idaho (A. 36).

GWU made a national offer to purchase Sunshine securities from any owner. Because use of the channels of interstate commerce and the mails was necessary to make and carry out this offer, the Williams Act, 15 U.S.C. 78m(d)-78m(e), 78n(d)-78n(f), was applicable to GWU's efforts and to any actions taken by Sunshine with respect to GWU's offer (J.S. App. A-5).

On March 18, 1977, GWU purchased, in a privately negotiated transaction, 334,070 shares of the common stock of Sunshine, representing approximately six percent of the shares outstanding (J.S. App. A-5 n.6). On March 21, 1977, GWU filed with the

[2] The common stock of Sunshine Mining is registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act, 15 U.S.C. 78*l*(b), but is not and was not registered with the State of Idaho. That stock is listed for trading on the New York Stock Exchange, and it also is traded on the Spokane Stock Exchange (J.S. App. A-4, A-86).

Securities and Exchange Commission a "Schedule 13D report" disclosing both the six percent purchase and pertinent information.[3] The Schedule 13D report was the disclosure form established by the Commission to implement the basic purpose of the Williams Act—providing "full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case." S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967). It required the offeror to disclose certain types of information specified in the Commission's rules under the Williams Act, 17 C.F.R. 240.14d-1(c), and to comply with the substantive provisions of the Williams Act relating to withdrawal rights, proration and best price, 15 U.S.C. 78n(d)(5)-78n(d)(7).[4] It also was subject to the antifraud provision of the Act, 15 U.S.C. 78n(e).

[3] 15 U.S.C. 78n(d) requires any person who becomes a direct or indirect beneficial owner of more than five percent of a class of equity securities of certain issuers, by means of a tender offer, to comply with certain requirements. Under this section of the Act and Rule 14d-1 promulgated thereunder, 17 C.F.R. 240.14d-1, such persons must file a disclosure statement with the Commission. During all times here relevant, Rule 14d-1 required the disclosure statement to be filed on Schedule 13D, 17 C.F.R. 240.13D-101. The required filing of Schedule 13D pursuant to Rule 14d-1 has since been replaced by the requirement that Schedule 14D-1 be filed, 17 C.F.R. 240.14D-100.

[4] 15 U.S.C. 78n(d)(1) requires the filing to be made at the time copies of the tender offer or request or invitation for tenders are first published, sent or given to security holders of the target company. The information required to be included in the filing is specified in 15 U.S.C. 78n(d)(1) and in Rule 14d-1(a), 17 C.F.R. 240.14d-1(a).

Under the provisions of the Williams Act and the Commission's rules, GWU was free to commence its public offer on March 21, 1977, the day of the public filing and announcement.[5] GWU could not commence its offer on that day, however, because Idaho law also applied to the offer. The Idaho law was applicable to GWU's tender offer for Sunshine stock because Sunshine had a principal office in Idaho, maintained various assets within the State of Idaho, and had registered its securities with the Commission pursuant to Section 12 of the Securities Exchange Act, 15 U.S.C. 78*l*. See Idaho Code § 30-1501(6).

Idaho's law prohibited GWU from making a public tender offer until, among other things, it had: (1) submitted to the Director of the Idaho Department of Finance (who administers Idaho's takeover law), a report disclosing both GWU's intention to make a tender offer and the terms of the offer; (2) transmitted a copy of that report simultaneously to Sunshine; (3) published an advertisement describing GWU's intention to make such an offer, and the material terms of the proposed offer; (4) paid Idaho a fee that could be as high as $1,500; (5) participated in a hearing if Sunshine requested; and (6) waited until

[5] Sunshine filed suit against GWU in the United States District Court for the District of Idaho, alleging violations of the disclosure provisions of the Williams Act. (The filing of the action did not operate to stop the tender offer.) The court denied Sunshine's requests for injunctive relief, finding GWU's filings to be in compliance with federal law. *Sunshine Mining Co.* v. *Great Western United Corp.*, [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,049 (D. Ida. April 22, 1977).

the State had decided that GWU had complied with Idaho's law and until all rights to judicial review had been exhausted. Idaho's Code §§ 30-1503(1), 30-1503(2), 30-1503(4) and 30-1508.

GWU attempted to comply with the Idaho law by filing the required registration statement with the Department of Finance of that State on March 21, 1977 (J.S.. App. A-8). GWU then waited, because the tender offer could not commence until the registration statement was approved by the Director of Finance. Idaho Code § 30-1503(4). The statute established no time limit within which the Director must act.[6] On March 25, 1977, Melvin Baptie, Deputy Administrator of the Department of Finance, sent to GWU a letter commenting on the disclosure contained in the registration statement and requesting GWU to file a new registration statement providing additional disclosure (A. 77-85).[7] Appellant McEldowney, as Director of Finance, simultaneously entered an *ex parte* order delaying the effective date of GWU's proposed offer in every state where that offer would have been made (A. 86-87).

[6] There may be an implicit time limit. A hearing may be required by the Director (and must be held if requested by the board of directors of the target company). Such a hearing must be called within 20 days of the filing of the registration statement and the decision following a hearing must be reached within 30 days of the filing date. Idaho Code §§ 30-1503(4) and 30-1503(5).

[7] The Department took the position that the registration statement filed by GWU was not a "registration statement" within the meaning of Idaho Code § 30-1503(2) because it contained deficient disclosure. According to the letter, the 20-

2. On March 28, 1977, because of uncertainty about when its tender offer could go forward, GWU filed this action in the United States District Court for the Northern District of Texas, seeking an order declaring that state takeover laws,[8] insofar as they applied to an interstate cash tender offer for the purchase of securities traded on a national securities exchange: (1) placed an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, and (2) were invalid under the Supremacy Clause because they intruded into an area preempted by federal regulation.[9]

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day period within which to call a hearing would not begin to run until GWU had filed a disclosure document that the Department "accepted as complete" (A. 85). The letter ended by stating that GWU could elect not to amend its material, in which event "the Director is prepared to call for a hearing on his own initiative, to determine whether or not the application filed on March 21, 1977, contains sufficient disclosure" (*ibid.*).

[8] GWU also had been advised by the Attorney General of New York that New York might assert jurisdiction over the tender offer under its takeover statute, and by officials responsible for administering the Maryland takeover statute that they could not comment on the applicability of their law without a hearing (J.S. App. A-8). See Md. Corp. & Ass'ns Code Ann. § 11-901 *et seq.* (Cum. Supp. 1976); N.Y. Bus. Corp. Law § 1601 *et seq.* (McKinney Supp. 1976-1977). GWU sought relief against those statutes as well as against Idaho's law. Allegations related to the New York and Maryland laws were dismissed after it became apparent that neither State would assert jurisdiction over GWU's offer (J.S. App. A-9).

[9] Sunshine filed suit in the United States District Court for the District of Idaho, seeking to restrain GWU from continuing its tender offer until the Director of the Idaho Department of Finance, pursuant to the Idaho takeover law, conducted a full hearing on the fairness and adequacy of disclosure with respect to GWU's tender offer. That action was settled and dismissed on October 5, 1977. *Sunshine Mining Co.* v. *Great Western United Corp., supra.*

The district court granted a temporary restraining order against the application of the Idaho statute, but the court of appeals issued a stay and instructed the district court to consider the question of its jurisdiction (J.S. App. A-9). The court did so and, after a trial, both held that it had jurisdiction and enjoined the application of the state statute (*id.* at A-85 to A-125). The court reasoned that Idaho's law is invalid under the Commerce clause as an infringement on the free flow of interstate commerce and under the Supremacy Clause because it is inconsistent with the Williams Act.

A divided panel of the court of appeals affirmed (J.S. App. A-1 to A-84). After concluding that a federal court in Texas has personal jurisdiction over the Idaho state officials, that venue was proper in Texas, and that GWU has standing to challenge the application of the Idaho law, the court concluded that the state statute is both preempted by the Williams Act and invalid under the Commerce Clause.[10]

The court concluded that the Idaho law is preempted because it stands as an obstacle to the achievement of the purposes of the Williams Act. It interpreted the Williams Act as a disclosure statute, one designed

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[10] Judge Godbold, who dissented on the jurisdiction and venue issues (J.S. App. A-63 to A-83), stated that he agreed with the majority on the merits (*id.* at A-83).

to be neutral between offeror and target company. The Idaho statute, by contrast, was designed to be favorable to companies that seek to resist tender offers. The court concluded that the Williams Act relies on decisionmaking by informed investors, while the Idaho act relies on decisionmaking by the directors of the company intended to be acquired. That difference in approach placed the Idaho law in irreconcilable conflict with the federal law by hampering the ability of investors to make decisions in their own interests.

The state law is invalid under the Commerce Clause, the court reasoned, because Idaho has only a tangential relationship to interstate corporate takeovers, yet its law requires a halt to offers anywhere in the nation. The court identified a potential for conflict with other state laws that was not justified by the nature of Idaho's interest.

SUMMARY OF ARGUMENT

I.

Idaho has undertaken, through application of the Idaho Corporate Take-Over Law, Idaho Code § 30-1501 *et seq.* (Supp. 1978), to delay (and perhaps forbid) a tender offer made by a Delaware corporation, from its principal offices in Texas, to target company shareholders of whom nearly 98% reside outside of Idaho. That law is invalid under the Commerce Clause for two reasons.

1. First, the Idaho law is an attempt to exercise extraterritorial jurisdiction—jurisdiction of a scope well beyond that of traditional state "blue sky" laws,

which were preserved by the savings clause, Section 28(a), of the Securities Exchange Act, 15 U.S.C. 78bb(a). The Idaho law regulates tender offers even if the offers, acceptances, and tenders never touch Idaho's commerce, so long as the target company has certain contacts with Idaho. The law thus enables the State to deprive security holders having no relation to Idaho of opportunities to receive tender offers, and it confronts bidders, acting entirely outside of Idaho, with the choice of either risking substantial penalties by ignoring the Idaho law or accepting delay and other obstacles to success of the offer by attempting to comply with the law. Because the Commerce Clause prohibits a state from exercising laws designed to regulate conduct that occurs outside the state's borders, the law at issue here is invalid.

2. Even when a state simply regulates transactions within its borders, the regulation must not impose on interstate commerce a burden clearly excessive in relation to the local interest served. The Idaho law imposes such an excessive burden.

Appellants cite several local interests allegedly served by the Idaho law and also argue that it is a valid means of regulating the "internal affairs" of corporations with substantial assets in the State. None of the interests asserted is significantly related to or advanced by the law, and it cannot properly be characterized as "internal affairs" regulation.

The interests asserted by appellants as the primary justification of the law—protection of Idaho

investors—is not significantly promoted by the law because it can protect Idaho investors only when they hold securities of a target company with a particular economic nexus to Idaho. The law does not apply to Idaho residents who hold shares in other companies. Moreover, because it exempts from coverage any tender offer that is accepted by the board of directors of a target company, and any tender offer directed at a company with fewer than 100 stockholders, the law often does not protect Idaho shareholders even when the firm has the necessary nexus. This friendly offer exemption, together with certain provisions that enable target company management to force indefinite delays in the commencement of an offer, make the law one that "regulates the making of tender offers primarily for the benefit of management of the target company" (J.S. App. A-119 to A-120) rather than one that protects investors who reside in Idaho.

Other local interests suggested by appellants—protecting local creditors and employees from injury by third-party tender offers and fostering civic-minded management—are unrelated to the substantive provisions of the law. The standards for approving registration statements do not include consideration of potential harm to employees or creditors, and disclosure of information related to those interests cannot by expected to be of great concern to security holders —particularly those not residing in Idaho—when they confront the predominantly economic choices associated with a tender offer.

The Idaho law cannot be justified as a means of regulating the internal affairs of a target company; to the contrary, it regulates the business of bidders. In any event, Idaho has little interest in regulating the internal affairs of target companies, such as Sunshine, that are incorporated in other states. There may be some "internal affairs" issues that Idaho could properly regulate (for example, the responses of the boards of directors of Idaho-incorporated companies to tender offers), but by regulating only the relationship between security holders and the bidder, and only in the context of nonconsensual offers, the Idaho law systematically avoids such issues.

Although the interests assertedly served by the Idaho law thus are insignificant, the burdens imposed by the statute are substantial. The pre-commencement filing and waiting requirements create the potential for extended delay. This delay and uncertainty can discourage tender offers and disrupt the orderly functioning of the nation's secondary securities markets by increasing the likelihood or irregular price and volume fluctuations in the securities of both the bidder and the target company. Because the Idaho law thus imposes a substantial burden on commerce not justified by any effective promotion of legitimate state interests, it violates the Commerce Clause.

II.

A state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" embodied in federal law must yield under the Supremacy Clause to the federal statute. *Hines* v. *Davidowitz*, 312 U.S. 52, 67

(1941). Achievement of congressional purposes may sometimes require that particular conduct be left unregulated or that it be regulated only in a particular manner so as to preserve a balance among the interests of affected parties.

By enacting the Williams Act, Congress sought to protect investors confronted with tender offers. Congress selected the method of requiring the material terms of such offers to be disclosed to investors and of affording both the bidder and the management of the target company a fair opportunity to present its case to investors. This system of disclosure and investor choice is incompatible with a system that creates pre-offer delay. Congress considered and rejected proposals to require pre-commencement disclosure to the Commission and target management. To require such disclosure would be to give target management a weapon with which to delay commencement of an offer and possibly prevent its being made, even though the security holders have had no opportunity to learn of its terms. Delay gives target management the upper hand by creating uncertainty and silencing the potential bidder. It thus upsets the balance between the interests of bidders and those of target management that Congress intended to achieve.

Congress amended the Williams Act in 1970 (84 Stat. 1497); in 1976 it enacted the Hart-Scott-Rodino Antitrust Improvements Act, Section 201 of which (15 U.S.C. 18a) affects certain categories of tender offers. On both occasions Congress made it clear that it was preserving its Williams Act "commit-

[ment] to a policy of neutrality in contests for control" (*Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 29 (1977)).

The Idaho law regulates tender offers in precisely the manner that Congress rejected as contrary to the welfare of investors. It imposes pre-commencement disclosure requirements that target management can use to delay or thwart tender offers and thus upsets the balance struck by Congress in the Williams Act. The Idaho Corporate Take-Over Law is therefore invalid under the Supremacy Clause.

ARGUMENT

I

THE IDAHO CORPORATE TAKE-OVER LAW IS INVALID UNDER THE COMMERCE CLAUSE

At least since the Court's decision in *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299 (1851), "it has been clear that 'the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States * * *. [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.'" *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 370-371 (1976), quoting *Freeman* v. *Hewit*, 329 U.S. 249, 252 (1946).

Idaho has undertaken, through application of the Idaho Corporate Take-Over Law, to delay (and

perhaps to forbid) a tender offer made by a Delaware corporation, from its principal offices in Texas, to shareholders of a "target company" [11] incorporated in Washington. Nearly 98% reside outside of Idaho. Such an assertion of state legislative authority encroaches on that "area of free trade" created by the Commerce Clause by interfering with the conduct of interstate commerce within Idaho and, more dramatically, throughout the Nation.[12]

We make two arguments, First, a law with such an extensive extraterritorial reach is invalid because, unlike traditional state securities regulation, it amounts to an assertion of extraterritorial jurisdic-

[11] We use the term "target company" to describe Sunshine because that term is used in the Idaho statute and has been adopted by the parties. The Commission's tender offer rules use the term "subject company," which the Commission prefers because it lacks the predacious connotations of "target company."

[12] Appellants incorrectly suggest (Br. 86) that the Commerce Clause holdings of the courts below are "judicially imposed requirement[s] that tender offers be solely regulated by federal law." The courts did not so hold, and we make no such argument here. The Commission believes that it may be appropriate for a state to regulate various aspects of tender offers for non-public companies incorporated within the state if most of the shareholders of the company reside within the state. A state might also promote legitimate local interests with respect to tender offers subject to Williams Act disclosure requirements (15 U.S.C. 78n(d)) by, for example, imposing liability for deceptive or fraudulent statements made to Idaho security holders in connection with such offers. It might also regulate the conduct of management of Idaho-incorporated target companies in their responses to tender offers (see note ~~80~~, *infra*).

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tion.[13] In Commerce Clause cases this Court has "frequently * * * spoken in terms of 'direct' and 'indirect' effects and burdens" on interstate commerce (*Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)), and has held that states are prohibited from directly regulating commerce in other states. *Shafer* v. *Farmers Grain Co.*, 268 U.S. 189, 198-199 (1925). Second, the law is invalid because the burden on commerce is disproportionately great when compared with the law's asserted benefits.

A. The Idaho Law is Invalid Because it Directly Regulates Interstate Commerce

States traditionally have regulated intrastate securities transactions. This Court has upheld, against Commerce Clause challenges, the authority of states to enact "blue sky laws" that regulate sales of securities within their borders.[14] Congress, too, has rec-

[13] This case is therefore unlike *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978), which involved no claim of regulation of transactions outside the State, and in which the alleged burden on commerce was only that certain out-of-state oil refining companies might decline to sell gasoline in Maryland because of a requirement that they divest themselves of retail gasoline stations in that State.

[14] *Hall* v. *Geiger-Jones Co.*, 242 U.S. 539 (1917); *Caldwell* v. *Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917); *Merrick* v. *N.W. Halsey & Co.*, 242 U.S. 568 (1917). The Uniform Securities Code, which has been adopted in large part by most states, regulates offers, sales and purchases within the enacting state and is thus an exercise of state power similar to that upheld by this Court in these three blue sky cases. L. Loss, *Commentary on the Uniform Securities Act* § 414(a)-(f) at 157 *et seq.* (1976 ed.).

ognized the validity and usefulness of such laws.[15]

[15] As we show at note 38, *infra*, Congress, in enacting federal securities laws, approved the continued exercise of existing state jurisdiction in this area but did not consent to extensions of state regulation to interstate transactions. To the contrary, although the House of Representatives approved a provision that indirectly would have increased the states' power to regulate securities transactions in interstate commerce, as part of the bill that was to become the Securities Act of 1933, this provision was eliminated in conference.

As passed by the House, H.R. 5480, 73d Cong., 1st Sess. (1933) contained two sections relating to state law: Section 17 (later enacted as Section 18) and Section 18(a), which was eliminated in conference. Section 18(a) would have made it a federal offense for any person to sell or deliver a security, through the mails or any means or instrumentality of interstate commerce, to any person in a state "where such sale or delivery, if it had taken place wholly within such State, Territory or the District of Columbia, would be in violation of the laws thereof relating to the sale of securities." This provision was intended to prevent evasion of state blue sky laws (H.R. Rep. No. 85, 73d Cong., 1st Sess. 10 (1933)) but was heavily criticized. This criticism pointed out (1) the lack of uniformity it would have created (see Remarks of Rep. Hill, 77 Cong. Rec. 2914 (1933)) and (2) the impropriety of delegating the power of Congress to regulate interstate commerce to the states (see H.R. Rep. No. 85, *supra*, at 27-29 (minority views of Rep. Merritt and Rep. Lea)). Congress enacted only the savings clause now found in Section 18 of the Securities Act of 1933, ch. 38, 48 Stat. 85:

> Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person.

That section, as explained in the Report of the Committee on Interstate Commerce of the House of Representatives, "carefully preserves the jurisdiction of State security commissions to regulate transactions within their own borders." H.R. Rep.

Unlike these traditional blue sky laws, the Idaho Corporate Take-Over Law does not focus on conduct within the borders of Idaho. Its major focus—as well as its major effect—is the regulation of commerce outside of Idaho.

A tender offer for securities of a widely-held, public company is quintessentially interstate commerce. The offer is communicated by use of the mails or other channels of interstate commerce to security holders across the country and abroad; securities are tendered by similar means. The offer may be made from Texas to security holders who live in New York and California. The acceptances and tenders may never touch Idaho's commerce. Yet the Idaho law operates directly on these interstate transactions, even when they take place entirely outside the State's borders. The State has asserted jurisdiction to control and regulate every "take-over offer"[16] for a

No. 85, *supra*, at 10. Section 28(a) of the Securities Exchange Act, 15 U.S.C. 78bb(a), which was enacted only a year after Section 18 of the Securities Act, is also understood to have preserved the traditional jurisdiction of state securities commissions. See I L. Loss, *Securities Regulation* 156 (1961).

[16] Subject to certain exclusions a "take-over offer" is defined to mean:

> the offer to acquire or the acquisition of any equity security of a target company, pursuant to a tender offer or request or invitation for tenders, if after acquisition thereof the offeror would be directly or indirectly the beneficial owner of more than five percent (5%) of any class of the outstanding equity securities of the issuer.

Idaho Code § 30-1501(5).

"target company" [17] with facilities in Idaho. The State asserts that it may deprive security holders having no relation to Idaho of the valued opportunity to receive a tender offer. The State's law gives bidders, acting entirely outside of Idaho, the choice of either violating Idaho law and incurring substantial risks [18] or attempting to comply with the provisions of that law while suffering the attendant delay and uncertainty.

The Idaho statute thus is an attempt to exercise extraterritorial jurisdiction. Idaho claims the right to tell a New York seller of securities, and a Texas buyer, whether and on what terms they can trade through the channels of interstate commerce. It

[17] Idaho Code § 30-1501(6) defines a "target company" as "a corporation or other issuer of securities which is organized under the laws of this state or has its principal office in this state, which has substantial assets located in this state, whose equity securities of any class are or have been registered under chapter 14, title 30, Idaho Code, or predecessor laws or section 12 of the Securities Exchange Act of 1934, and which is or may be involved in a take-over offer relating to any class of its equity securities."

[18] The compulsion to comply with the Idaho law, even when the conduct concerned occurs outside of Idaho, is found in two sections of the law: § 30-1510(1), which makes failure to comply with any section a separate criminal offense, punishable by a fine of $5,000 or a prison term not to exceed three years, or both; and § 30-1506(6), which provides:

> No offeror may acquire, remove or exercise control directly or indirectly over any assets of a target company located in this state in connection with a take-over offer unless the take-over offer is effective or exempt under this chapter, except as permitted by order of the director.

should be clear that this assertion of extraterritorial power is invalid. For example, although Idaho could fix the prices at which Sunshine sells its products to Idaho residents, it could not fix the prices at which Sunshine shares shall be traded in Florida or the prices at which Sunshine may sell products to Florida residents. Compare *Lemke* v. *Farmers Grain Co.*, 258 U.S. 50 (1922), with *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346 (1939). Cf. *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927). Although Idaho could establish a speed limit for Sunshine trucks travelling in Idaho, it could not set a speed limit for travel of Sunshine's trucks in Montana, no matter how great a percentage of Sunshine's assets are in Idaho. Just as a state may not place itself in economic isolation (see *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978)), so a state may not claim to dominate the rules for interstate commerce.[18a]

The law at issue in this case has a sweeping extraterritorial reach that its defenders concede and even say is necessary to its operation. (Appellants' Br. 105, 115). It is "an attempt by the State to prescribe rules under which an important part of [interstate] commerce shall be conducted." *Shafer* v. *Farmers Grain Co.*, *supra*, 268 U.S. at 201. The Commerce

[18a] The limits on a state's power to enact substantive legislation are no less precise than the limits on the jurisdiction of state courts: in either case, "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Shaffer* v. *Heitner*, 433 U.S. 186, 197 (1977).

Clause precludes the application of such a statute to commerce that takes place wholly outside Idaho's borders, whether or not the interstate commerce may be said to have effects within the State. *Ibid.*[19]

B. The Idaho Law is an Impermissible Burden on Interstate Commerce Under the Test of *Pike* v. *Bruce Church, Inc.*

Even when a state simply regulates transactions within its borders, the regulation must not impose on interstate commerce a burden clearly excessive in relation to the local interest served. *Pike* v. *Bruce Church, Inc.*, *supra*; *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, *supra*. Analyzed under this test, the Idaho statute is unconstitutional.

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[19] In the blue sky cases (note 14, *supra*), this Court upheld the statutes in question only after it first concluded that they imposed indirect or incidental, rather than direct, burdens on interstate commerce. *E.g.*, *Hall* v. *Geiger-Jones Co.*, *supra*, 242 U.S. at 559. This conclusion turned on the fact that the statutes applied only to conduct within the state. As this Court observed (*id.* at 557-558) (emphasis in original):

> The provisions of the law * * * apply to dispositions of securities *within* the State and while information of those issued in other States and foreign countries is required to be filed (§§ 6373-9), they are only affected by the requirement of a license of one who deals in them *within* the State. Upon their transportation into the State there is no impediment—no regulation of them or interference with them after they get there. There is the exaction only that he who disposes of them there shall be licensed to do so and this only that they may not appear in false character and impose an appearance of a value which they may not possess—and this certainly is only an indirect burden upon them as objects of interstate commerce, if they may be regarded as such.

Appellants assert that the Idaho statute is primarily aimed at protecting local security holders (Br. 93, 104) and that it serves subsidiary interests of the State in protecting "creditors and employees of the target company as well as * * * the corporate entity itself" (Br. 92) and in assuring the presence of civic-minded management in companies with Idaho facilities (Br. 103). Appellants also argue that the statute is justified as a form of regulating the "internal affairs" of corporations with substantial assets within the State (Br. 104-114).

As the court of appeals concluded (J.S. App. A-52 to A-62), none of these asserted local interests is significantly related to or advanced by the operation of the Idaho Corporate Take-Over Law, and the statute cannot properly be characterized as "internal affairs" regulation. Since this statute does not advance any asserted legislative objective of Idaho, it would thus be invalid even if it imposed only a slight burden on interstate commerce. See *City of Philadelphia* v. *New Jersey*, *supra*, 437 U.S. at 624. As we show below, however, it imposed a substantial burden on interstate commerce. Furthermore, any legitimate local interests may be protected by laws imposing a lesser burden on interstate commerce.

1. *Local interests served*

a. *Local investor protection.* The Idaho statute cannot be justified as a rule that protects the interests of Idaho investors. It does not even operate when a tender offer is being made to residents of

Idaho unless the target company possesses a particular economic nexus to Idaho (see note 17, *supra*). Idaho security holders of companies lacking the required "Idaho" characteristics thus have no protection at all. Moreover, local investors may in many other cases be deprived of the law's purported benefits as a result of express exemptions from coverage for any tender offer that is the subject of a favorable recommendation by the board of directors of a target company (Idaho Code § 30-1501(5)(e)) or for any tender offer directed at a company with fewer than 100 stockholders, if made to all stockholders (Idaho Code § 30-1501(5)(d)). The failure to regulate "friendly" offers is markedly inconsistent with the professed goal of investor protection, because security holders may well be more in need of protection in the face of an uncontested offer than in a contested battle for corporate control. See *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579, 598 (5th Cir.), cert. denied, 419 U.S. 873 (1974).[20] These exemptions, together with a provision allowing a target company's management to delay commencement of a tender offer by requesting an administrative hearing on the proposed offer, led the district court to conclude that the Idaho statute "regulates the making of tender offers primarily for the benefit of management of the target company" (J.S. App. A-119 to A-120).[21]

[20] Federal laws regulating tender offers do not have such an exemption for friendly offers.

[21] The district court's finding that the "purpose of the Idaho takeover statute is to inhibit tender offers for the benefit of management" (J.S. App. A-118 to A-119) draws additional support from the views of academic commentators with respect to state takeover statutes generally. See, *e.g.*, E. Aranow & H. Einhorn, *Tender Offers for Corporate Control* 172 (1973); Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 Texas L. Rev. 1, 26-28 (1978); Moylan, *State Regulation of Tender Offers*, 58 Marq. L. Rev. 687, 690 (1975); Note, *Commerce Clause Limitations upon State Regulation of Tender Offers*, 47 S. Cal. L. Rev. 1133, 1150 (1974). Appellants (Br. 94-99) and some *amici* (see, *e.g.*, Ohio Br. 7-8) argue that the state laws have not discouraged tender offers. There is, however, no practical means of testing this assertion. The observation that many tender offers have been made despite state laws tells us little about how many more would have been made absent state laws.

Although the Idaho law thus does not operate at all in many cases in which tender offers are made to Idaho residents, it is triggered in every case in which an offer is made for a company with the defined business relationship to Idaho, even though no security holders of the target company reside in Idaho.[22] Idaho would prohibit a tender offer here even if GWU restricted the offer to the nearly 98% of Sunshine's

[22] See Idaho Code §§ 30-1501(6) (definition of "target company") and 30-1503(1) ("effective" registration statement made a prerequisite for commencing a tender offer for "target company in this state"). Idaho Code § 30-1501(5)(c) exempts from the definition of "take-over offer" an offer "made to not more than ten (10) persons in this state * * *." Since this is not limited to residents of Idaho, this exemption would not be available if 10 shareholders of the target company were present in Idaho at any time during the term of a tender offer. Therefore, a prudent bidder must assume the applicability of the statute whenever the defined nexus between the target company and Idaho exists.

security holders neither residing nor found in Idaho;[23] that statute, as interpreted by the Idaho officials, also prohibits GWU from proceeding with its offer outside Idaho while going through the administrative process in Idaho.[24]

In sum, what appellants describe as the primary purpose of the law—the protection of Idaho investors—can be achieved only fortuitously, given the nature of the law's application. What appellants describe as a "necessary incident to protection of domestic shareholders" (Br. 115)—the effect of the law on investors outside of Idaho—often may be the dominant effect of the statute. And, as the court of appeals concluded, "Idaho has little reason to protect shareholders of other states" (J.S. App. A-53), many of whom might well prefer the opportunity to deal with a bidder without the delay and uncertainty created by the Idaho law.

b. *Other local interests.* Appellants also argue that the Idaho law protects local creditors and employees from injury resulting from third-party tender offers (Br. 92) and fosters civic-minded management (Br. 103). But the substantive provisions of the

[23] Idaho Code § 30-1506(1) provides that "no offeror may make a take-over offer involving a target company which is not made to all its stockholders in this state * * *."

[24] The Idaho Department of Finance, in its letter commenting on GWU's registration statement, said (A. 80): "It is our position that tenders made within and without the State of Idaho would be unlawful unless the tender offer is effective or exempt under Chapter 15, Title 30 of the Idaho Code."

statute bear little relationship to these interests. The statute contains no standard by which the Director of Finance may deny approval of a registration statement if he concludes that the offer will injure the interests of creditors or employees of the target company. Nor does the statute in any way relate the approval of a registration statement to the promotion of civic-minded local management.[25] Even when a hearing is called, whether by the Director of Finance or at the instance of the board of directors of the target company, the Director may deny "registration" only if he concludes that the offeror has failed to provide the information required by the statute or if he finds that the offer would either not be made on equal terms to all security holders or would violate the Idaho blue sky law (Idaho Code § 30-1503(5)). As for the disclosure function of the statute, there is no reason to believe that security holders of the target company—especially those not residing in Idaho—will give significant consideration to local community interests when confronted with the predominantly economic choices associated with a tender offer.

[25] The statute is not confined in operation to locally-owned or locally-managed firms; it applies to any target firm with substantial assets in Idaho, including firms managed from other states. What is more, any presumption that locally-owned or managed firms are more "civic-minded" or better for Idaho in some other way comes perilously close to discrimination against interstate commerce for its own sake. The Commerce Clause precludes a state from relying on any supposed virtues of economic isolation as a justification for its statutes. *City of Philadelphia* v. *New Jersey*, *supra*.

The court of appeals concluded that the Idaho law does not advance the state interests discussed here "more than incidentally" (J.S. App. A-60). Even if it did, these interests would not justify the burden the law imposes on interstate commerce, because the State can achieve its goals more effectively by laws that directly regulate these secondary interests, and in doing so impose a lesser burden on interstate commerce. *Great Atlantic & Pacific Tea Co.* v. *Cottrell, supra*, 424 U.S. at 373; *Pike* v. *Bruce Church, Inc., supra*, 397 U.S. at 142; *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 354 (1951).[26]

c. *Internal affairs regulation.* Appellants and *amici* argue that the authority to enact statutes of the kind at issue here is part of a right to regulate the "internal affairs" of Sunshine and other corporations with assets in the regulating state. This argument fails because (1) the Idaho takeover statute is not designed to regulate the internal affairs of Sunshine or any other target company in Idaho (to the contrary, the statute regulates the business of GWU); and (2), as the court of appeals recognized, Idaho does

[26] As the court of appeals stated, the promotion of civic-mindedness can be achieved by conferring benefits on corporations that make exceptional contributions to local welfare, or by devising programs to involve management in community affairs (J.S. App. A-61). Similarly, local creditors can be protected by legislation regulating the creditor-debtor relationship, while local employees can be protected through the enactment of labor-management laws designed to promote job security, or by health and safety laws to protect them at their place of work.

not, in any case, have a legitimate interest in regulating the internal affairs of Sunshine, because Sunshine is a corporation of the State of Washington and many other target corporations also are likely to be foreign corporations (J.S. App. 46 n.53).

The "internal affairs doctrine" pertains to issues peculiar to the relations among or between the corporation and its current officers, directors and shareholders. Some state usually has the authority to regulate this relationship. Only one state should have this authority, because otherwise a corporation could be faced with conflicting demands.[27] This rationale does not apply to the relationship between shareholders and third parties, such as those existing in the con-

[27] Appellants wrongly suggest that any state law deemed to relate to the internal affairs of a corporation is invulnerable to a Commerce Clause challenge regardless of the burden it imposes on interstate commerce (Br. 105). The "internal affairs doctrine" is a conflict of laws concept based on a recognition that a corporation would be greatly hampered in conducting business affairs in more than one state if by doing so it subjected itself to multiple and possibly inconsistent laws governing its internal relationships and processes. *Restatement (Second) of Conflict of Laws* § 302, comment (b) at 307-308 (1971). The doctrine thus furthers the same principles of free trade that underlie the Commerce Clause by facilitating the doing of interstate or multi-state business by corporations. Indeed, it has been suggested that the Commerce Clause itself supplies a suitable rationale for requiring the choice of a single state's law to govern those aspects of the internal workings of a corporation that demand a uniform resolution regardless of the place of the forum. See Horowitz, *The Commerce Clause As A Limitation On State Choice-of-Law Doctrine*, 84 Harv. L. Rev. 806, 814 (1971).

text of a tender offer.[28] The Idaho law focuses primarily on the regulation of the relationship between shareholders and bidders and, therefore, does not fall within the "internal affairs doctrine." While there may well be "internal affairs" issues related to some tender offers that could be regulated by some state,[29] none of these issues is addressed by the Idaho law. Indeed, by regulating only the relationship between security holders and the bidder, and only in the context of "unfriendly" offers, the Idaho statute systematically avoids any issues touching on the internal affairs of the target company (see page 23, *supra*).[30]

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[28] A tender offer is, in this regard, quite unlike a proxy contest. In a proxy contest the participants are acting as shareholders who invoke the internal mechanisms of the corporation. In a tender offer, as this Court has recognized, a bidder does not ordinarily act in the capacity of a shareholder, even if the bidder happens to own some shares prior to the commencement of the offer. *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 39 (1977).

[29] For example, a state might regulate the conduct of the management of the target company in responding to a tender offer by requiring the board to give careful attention to the offer and to make a written report to shareholders about the offer. Or a state might otherwise regulate the discharge of fiduciary obligations among the corporation, its officers, directors and shareholders. See, *e.g.*, *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977).

[30] The Idaho statute purposefully excludes from its purview "friendly" tender offers—although these are the ones most apt to involve a breach of a fiduciary obligation by incumbent management under state law. *Smallwood* v. *Pearl Brewing*, *supra*. Even when the Idaho statute applies, it places no duties

The Idaho statute is similar in these respects to blue sky legislation, which does not fall within the category of internal affairs regulation (*Restatement (Second) of Conflict of Laws* § 302, comment (f) at 311 (1971)), although the Idaho statute has a much broader territorial application than blue sky laws.

2. *The balance between the direct and substantial burdens on interstate commerce imposed by the Idaho statute and its purported local benefits*

The analysis to this point shows that the Idaho statute does not effectively promote any of the local interests asserted in its defense. At the same time, the statute places a substantial burden on interstate commerce.

Appellants acknowledge, and even emphasize, that the Idaho statute operates extraterritorially—that a bidder having no contact with Idaho may be subject to criminal prosecution there if it engages in securities transactions outside of Idaho. In order to avoid this threat of punishment, the offeror must comply with potentially burdensome rules. The measure of this burden is not limited, as appellants imply (Br. 118-120) to the cost of processing forms to be filed pursuant to the statute. The burden also includes the costs to prospective bidders of delays, the length of which may be difficult to estimate because of the uncertainties engendered largely by the broad discre-

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or responsibilities on the board of directors, officers or shareholders of the subject company. It does not regulate the relationship between target directors and target shareholders in any way.

tion lodged in the Director of Finance (see pages 55-57, *infra*). The statute also distorts the economic choices open to the bidder because, as its provisions demonstrate (page 24, *supra*), and appellants freely admit (Br. 95, 102), it is designed to channel tender offers for target companies into the mold of negotiated forms of corporate acquisition such as mergers or "friendly offers." This can also interfere with the opportunities of security holders to dispose of their shares in a tender offer not approved by management. And see Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 Texas L. Rev. 1, 519, 28-29 (1978). The State's effort to discourage the making of unfriendly tender offers for large corporations, frequently national in character, creates a substantial interference with interstate securities transactions.

GWU confronted costs, delay, and the associated obstacles created by Idaho when it filed its registration statement on March 21, 1977. Idaho's law was not GWU's only problem. It also was forced to contend with the laws of New York and Maryland, both of which arguably applied to the proposed tender offer.[31] The takeover laws of those States, like the

[31] N.Y. Bus. Corp. Law §§ 1601-1613 (McKinney Supp. 1976-1977); Md. Corp. & Ass'ns Code Ann. §§ 11-901 to 11-908 (Cum. Supp. 1978). Subsequent events have shown that there was, in fact, a real possibility that the laws of more than one state could be invoked. In response to a second tender offer by GWU (through its successor in interest, Hunt International Resources Corp.) for the remaining shares of Sunshine common

Idaho statute, apply to tender offers throughout the country. The multiplicity of mandatory regulations not only compounded GWU's practical problem of obtaining approval for its tender offer but also raised a possibility of having to meet inconsistent state law requirements. For instance, GWU "was concerned that the advance publication of a tender offer required by Idaho law would violate New York's prohibition of publication" (J.S. App. A-56). The spectre of such inconsistent requirements never materialized in this case, because New York and Maryland ultimately disclaimed jurisdiction.[32] The disclaimers here, however, do not remove the burdensome character of the potential application of a multiplicity of laws. As one commentator has observed:

> Even though the statutes governing a given takeover are few in number, there are many possibilities for conflict. The waiting periods vary, as do disclosure and hearing requirements. Standards of approval for the offer itself also differ. The opportunities for delay in one state could spell defeat for a tender offer made to shareholders in other states whose statutes have different provisions. It has been suggested that these burdens will disappear when states coordi-

stock, Sunshine obtained a restraining order from a Maryland state court, based on an alleged violation of the Maryland takeover statute. This action subsequently was removed to the federal district court in Baltimore and thereafter dismissed by stipulation. *Sunshine Mining and Metal Co.* v. *Hunt International Resources Corp.*, C.A. No. M-79-502 (D. Md., dismissed April 9, 1979).

[32] But see note 8, *supra*.

> nate their efforts and when conflicts of law principles are applied. State coordination is not guaranteed and conflicts of law principles will not preliminarily restrict the number of statutes with which an offeror must comply.

Note, 28 Case W. Res. L. Rev. 955, 1003-1004 (1978).

Finally, the pre-commencement filing and waiting procedures of the Idaho statute can disrupt the orderly functioning of another important part of interstate commerce—the nation's secondary securities markets. This results from the fact that the Idaho statute, like other state takeover laws, requires bidders publicly to announce the terms of their proposed offer at the time of the filing of the registration statement. In the pre-commencement period, the bidder may fail to win approval from the state officials or may be thwarted by a "friendly" offer not required to comply with the state law. Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 Fordham L. Rev. 1, 10-11 (1976). This uncertainty and delay increase the likelihood of irregular price and volume fluctuations in the securities of both the bidder and the target company. *Ibid.*[33]

[33] These disruptive effects were noted by Donald Calvin, Vice-President of the New York Stock Exchange, in testimony submitted during the passage of the Ohio takeover statute. (The Ohio law has provisions similar to those of Idaho).

> While this would provide an extended period during which the Division could review the offer and entertain protests by the target company management, it would also create difficult conditions in the market for the target company's stock. During the 20-day period there could be rumors, counter-offers and rumors of counter-offers which may result in price fluctuations to the extent that the market in the stock would be disrupted. This may make it necessary for the Exchange to temporarily halt trading in the stock. * * * The impact of the Ohio law would thereby be felt by investors throughout the Nation who would be deprived of a market for the securities they hold in the Ohio company.

Statement by the New York Stock Exchange on Amend. Sub. S.B. No. 138, File No. 90 (Reg. Sess. 1969-1970), May 9, 1969, quoted by Sommer, *The Ohio Takeover Act: What Is It?*, 21 Case W. Res. L. Rev. 681, 700 (1970). Calvin gave Congress a similar explanation of the disruptive effects attending any pre-commencement review, and Congress carefully drafted the Williams Act to avoid imposing these same burdens on the national securities markets (see pages 49-50, *infra*).

The burden placed by the Idaho takeover statute on the proper functioning of the national securities markets is especially evident with respect to arbitrageurs, the professional traders who often decide the outcome of a tender offer by their decisions to buy target company securities and their disposition of the acquired shares. Henry, *Activities of Arbitrageurs in Tender Offers*, 119 U. Pa. L. Rev. 466 (1971). Arbitrageurs are important to the bidder because they tender a substantial portion of the shares in most tender offers.[34] At the same time arbitrageurs provide a market for those shareholders of the target company who desire to sell their shares in the market prior to the termination of the tender offer.

[34] It has been estimated that arbitrageurs are responsible for more than half of all shares ultimately tendered. O'Boyle, *Changing Tactics in Tender Offers*, 25 Bus. Law. 863, 866 (1970).

The important functions of arbitrageurs can be severely hindered by the pre-commencement provisions of the Idaho statute, which dramatically increase the period during which the arbitrageurs' funds are at risk. The arbitrageur begins buying when the tender offer is first anounced and assumes a significant economic risk until the shares tendered by the arbitrageurs are actually accepted by the offeror. Under the Williams Act, the arbitrageur is at risk only between the commencement and termination of the offer, which is generally defined in advance by the offeror. Under the Idaho statute, the risk-taking for the arbitrageur begins prior to the commencement of the offer and may include an indefinite period of delay—complicated by great uncertainty about whether an offer will ever be made. Thus, by artifically magnifying the economic risks of arbitrageurs, the focal points of trading activity during the tender offers, the Idaho statute substantially distorts the free interplay of buying and selling interests in the national markets for the securities of bidders and target companies. Because the Idaho Corporate Take-Over Law thus imposes a substantial burden on commerce not justified by any effective promotion of legitimate state interests, it cannot survive challenge under the Commerce Clause. *City of Philadelphia* v. *New Jersey, supra; Great Atlantic & Pacific Tea Co.* v. *Cottrell, supra; Pike* v. *Bruce Church, Inc., supra.*

II

THE WILLIAMS ACT PREEMPTS THE IDAHO CORPORATE TAKE-OVER LAW

A. Federal Law Preempts Any Inconsistent State Law

The arguments we have made above demonstrate that the Idaho statute cannot constitutionally operate, as it does, to hinder interstate commerce. In our view, application of the Idaho law also is forbidden by the Supremacy Clause in light of the conflict between the Idaho law and the Williams Act.[35]

A state law is preempted if Congress has foreclosed all legislation by states concerning the particular subject matter. *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157-158 (1978). If Congress has not entirely occupied the field, a state law nevertheless cannot stand if there is a conflict between state and federal law. *Id.* at 158. See also *Hisquierdo* v. *Hisquierdo*, No. 77-533 (Jan. 22, 1979), slip op. 9-18; *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525-526 (1977). Whether there is such a conflict depends on the outcome of the two inquiries:

> A conflict will be found "where compliance with both federal and state regulations is a physical impossibility * * *," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), or where the state "law stands as an

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[35] The arguments based on the Williams Act and the Supremacy Clause, if accepted by the Court, demonstrate the invalidity of the Idaho statute even if the Court disagrees with our contentions under the Commerce Clause.

obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *Jones* v. *Rath Packing Co.*, *supra* at 526, 540-541. Accord, *De Canas* v. *Bica*, 424 U.S. 351, 363 (1976).

Ray v. *Atlantic Richfield Co.*, *supra*, 435 U.S. at 158.

We do not here contend and the court of appeals did not hold that the federal government has occupied the entire field of securities regulation.[36] Congress has approved concurrent regulation of many types of securities transactions by federal and state governments.[37] Thus, appellants' discussion and distinction of cases setting out a "test for occupation of the field" (Br. 70, 72-74) are irrelevant. Congress has not, however, authorized state regulation of securities transactions when that regulation undermines federal law. Quite the contrary. Section 28

[36] Appellants thus err in arguing that a state law is preempted only when there is "a practical impossibility of compliance with federal law as a result of the state incursion into the regulated field" (Br. 24). They also err in contending that the Commissioner has interpreted the Court's decisions in this way (Br. 68 n. 95). They rely on two releases issued under the Investment Advisers Act. But these releases, as the court of appeals observed, "only note in passing that state requirements not in conflict with federal law are valid" and "do not define 'conflict' " (J.S. App. A-38 n. 41).

[37] See Section 18 of the Securities Act of 1933, 15 U.S.C. 77r; Section 222 of the Investment Advisors Act of 1940, 15 U.S.C. 80b-18a; Section 50 of the Investment Company Act of 1940, 15 U.S.C. 80a-49; Section 21 of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79(u); Section 326 of the Trust Indenture Act of 1939, 15 U.S.C. 77zzz.

(a) of the Securities Exchange Act, 15 U.S.C. 78bb(a), unmistakably bars any state from enacting a law that conflicts with either the Act "or the rules and regulations thereunder."[38] The question here thus is whether the Idaho statute conflicts with the Williams Act by frustrating the execution of its objectives.

Achievement of the goals of a federal program sometimes depends as much on leaving particular conduct unregulated as it does on assuring effective

[38] Because the legislative history of Section 28(a) indicates that it was intended to express the principles of the Supremacy Clause, the court of appeals correctly rejected appellants' contention that the section permits state regulation that the Supremacy Clause otherwise would forbid (J.S. App. A-35 to A-37). See *Stock Exchange Practices: Hearings on S. Res. 84 (72d Cong.) and S. Res. 56, and S. Res. 97 (73d Cong.), pt. 15, National Securities Exchange Act of 1934, Before the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 6577 (1934) (remarks of Thomas Corcoran, spokesman for the draftsmen of the bill). In any event, appellants appear to have abandoned this contention.

Moreover, as the court of appeals also observed (J.S. App. A-36 n.39), it is doubtful that Section 28(a) operates to save relatively recent laws—such as the Idaho statute here—with an unprecedented extraterritorial reach. As part of the original Securities Exchange Act, Section 28(a)—titled "Effect on Existing Law"—was designed to preserve the traditional jurisdiction under state blue sky laws. As we explain *infra*, at note 58, the Williams Act was incorporated into the Securities Exchange Act at a time when none of the state takeover statutes had been enforced, although one such statute had been passed. As the court of appeals reasoned (J.S. App. A-36 n.39): "[W]hen subsequent state legislation is not of substantially the same character as the laws Congress intended to save, the savings clause may not save the subsequent state laws."

enforcement of the provisions regulating other conduct. The congressional plan may include an important role for unfettered private decisionmaking. In such cases, both what the law requires and what it leaves alone may be essential to success of the regulatory strategy. This is, of course, especially clear when the legislative history of a federal statute contains express indications of a congressional intent to create a balance between the interests of affected parties and express rejections of proposals for imposing or extending particular requirements or restrictions. A state law that disturbs the congressionally selected balance among the interested groups by imposing more extensive or restrictive requirements obstructs "the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). See also *New York Central R.R.* v. *Winfield*, 244 U.S. 147, 153 (1917).

Thus in *Goldstein* v. *California*, 412 U.S. 546 (1973), on which appellants rely (Br. 71-73), this Court distinguished the potential threat to congressional objectives posed by state laws on record piracy —a matter subject to the federal copyright power but not included in the regulatory scheme of the copyright laws—from the threat that state laws restricting the copying of mechanical configurations might pose to federal patent laws on that matter. As the Court explained regarding the latter (*id.* at 569-570):

> In regard to mechanical configurations, Congress had balanced the need to encourage innovation and originality of invention against the need to insure competition in the sale of identical or substantially identical products. The standards established for granting federal patent protection to machines thus indicated not only which articles in this particular category Congress wished to protect, but which configurations it wished to remain free. The application of state law in these cases to prevent the copying of articles which did not meet the requirements for federal protection disturbed the careful balance which Congress had drawn and thereby necessarily gave way under the Supremacy Clause of the Constitution.

See also *Ray* v. *Atlantic Richfield Co.*, *supra*, 435 U.S. at 178; *Aronson* v. *Quick Point Pencil Co.*, No. 77-1413 (Feb. 28, 1979).[39]

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[39] *New York Telephone Co.* v. *New York State Department of Labor*, No. 77-961 (March 21, 1979), also follows this approach. This Court affirmed a judgment that a New York law authorizing the payment of unemployment compensation to striking employees is not preempted by the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, even though the law "alters the balance in the collective bargaining relationship and therefore conflicts with the federal labor policy favoring the free play of economic forces in the collective bargaining process" (*New York Telephone Co.* v. *New York State Department of Labor*, 566 F.2d 388, 390 (2d Cir. 1977)). Nonetheless, all of the opinions written in the case accepted the proposition that a state law directly regulating the collective bargaining relationship would necessarily yield, under the Supremacy Clause, to the National Labor Relations Act if enforcement of the law would disturb the balance struck by Con-

As we show below, the Idaho Corporate Take-Over Law disturbs a balance struck by Congress in the Williams Act. The Idaho law embodies a regulatory approach that favors the interests of the management of target companies and imposes particular requirements that Congress deliberately rejected as being inconsistent with its aim of protecting investors. The Idaho law therefore obstructs the accomplishment of Congress' objectives.

B. The Williams Act Protects Investors by a Neutral Disclosure Scheme that Does Not Impose Delays Before the Commencement of a Tender Offer

In adding the Williams Act provisions to the Securities Exchange Act of 1934, Congress sought to ensure that shareholders confronted by tender offers would not be required to make investment deci-

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gress and Congress had not expressly indicated its willingness to tolerate such interference with its policy.

Appellants cite (Br. 72-76) certain decisions of this Court sustaining state laws in the face of Supremacy Clause challenges and suggest that the test as applied in those cases would require the same result here. But none of those cases—(*Kewanee Oil Co.* v. *Bicron*, 416 U.S. 470 (1974); *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U.S. 117 (1973); *New York Dept. of Social Services* v. *Dublino*, 413 U.S. 405 (1973); *Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132 (1963)—concerned federal and state statutory schemes with antagonistic strategies for achieving what was ostensibly the same purpose. (In *Merrill Lynch, supra*, 414 U.S. at 140, the Court expressly found that the state law in question produced no "interference with the federal regulatory scheme.") Rather, as in *Aronson, supra*, federal and state programs either were complementary (see also *DeCanas* v. *Bica*, 424 U.S. 351 (1976)) or were concerned with different subjects.

sions without adequate information. *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975); S. Rep. No. 550, 90th Cong., 1st Sess. 1 (1967) ("1967 Senate Report").[40] Congress did not, however, seek to discourage the making of tender offers, for it recognized that such offers can serve "a useful purpose in providing a check on entrenched but inefficient management." 1967 Senate Report at 3.[41]

To achieve its goal of protecting investors without depriving them of the opportunity to benefit from

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[40] The provisions and background of the Williams Act are extensively discussed in *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 19-33 (1977). References to the Act's purpose of protecting investors, on which the Court focused, can be found throughout the legislative history of the Williams Act. See, *e.g., Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 2, 15, 16, 42, 43, 107 (1967) ("1967 Senate Hearings").

[41] See also the following colloquy between Senator Javits and Senator Williams concerning the bill (S. 510) that became the Williams Act:

> Mr. JAVITS: One other question I should like to ask the Senator: There is no intendment in the measure, or in the fact that the measure is offered, to in any way condemn the practice of making tenders, is there? Sometimes stockholders do very well because of tenders, especially competitive tenders.
>
> Mr. WILLIAMS of New Jersey: There is no intention in any way to prohibit tender offers. As a matter of fact, I think it might encourage them. Through this legislation people will have more information, and will be able to intelligently decide whether to accept a tender offer and sell their shares to a group which may wish to obtain a controlling interest.

113 Cong. Rec. 24665 (1967).

tender offers, Congress struck a balance. It required that tender offers include certain types of information to aid security holders in deciding whether to sell, and it required that this information be sent to the target company's management as well as to the Commission and the target company's security holders.[42] 15 U.S.C. 78n(d). It did not, however, require that this information be publicly filed or otherwise made available to target company management before the offer could commence. Such a requirement would make it possible for the target company's management to take steps to delay the offer even before the security holders learned of its terms. Thus, as this Court observed in *Rondeau* v. *Mosinee Paper Corp.*, *supra*, 422 U.S. at 58:

> By requiring disclosure of information to the target corporation as well as the Securities and Exchange Commission, Congress intended to do no more than give incumbent management an opportunity to express and explain its position. The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts.

The Williams Act was carefully devised to avoid "tipping the balance of regulation either in favor of

[42] If a bidder's initial disclosure is inadequate, the Commission can ask the bidder to republish its offer with fuller disclosure, and it has done so in a number of cases. See, *e.g.*, the Commissioner's public file (5-file) for the following tender offers: 5- Thompson Industries, Ltd.; 5- Detroit International Bridge; 5- Flying Dragon Oil Corp.

management or in favor of the person making the takeover bid" and was designed to protect investors by ensuring that "the offeror and management [each enjoys an] equal opportunity to fairly present [its] case." 1967 Senate Report at 3; H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968) ("1968 House Report"). The connection between this even-handed approach toward regulating tender offers and the Act's purpose of protecting investors is demonstrated by the fact that the approach is explained in the section entitled "Protection of Investors" in each report. *Ibid.* This Court has recognized that "Congress was indeed committed to a policy of neutrality in contests for control" (*Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 29 (1977)).

Congress decided that disclosure, coupled with neutrality between bidders and target company management, would afford to investors the best combination of protection against uninformed decisions and opportunity to realize profits. The Williams Act plan permits investors to decide, even at the expense of target management. The Idaho Corporate Take-Over Law, by contrast, is a scheme of tender offer regulation that favors target company management, most notably through pre-commencement disclosure provisions of the sort Congress expressly rejected and through an exemption for "friendly offers." It permits target company management to decide even at the expense of investors. Congress had a particular conception of how tender offers should operate, and the Idaho law interferes in that process.

Appellants (Br. 78-81) and *amici* (Ohio Br. 6; National Association of Insurance Commissioners (NAIC) Br. 20-23) contend that "investor protection" rather than "neutrality" is the basic purpose of the Williams Act. Therefore, they continue, states are free to enact additional "investor protection" laws even though such laws would undermine a neutrality policy.[43] This position, however, assumes that "investor protection" is an objective that can be understood and achieved without considering the means employed by the state law and the means that Congress rejected as destructive of such an objective. The legislative history of the Williams Act shows that Congress concluded that Idaho's approach to "investor protection" would undermine that very goal.

The critical date for the operation of the Williams Act is the date a tender offer is "first published or sent or given to security holders" by a bidder, *i.e.*,

[43] In making this argument, appellants rely (Br. 78-80) on a misconstruction of this Court's statement in *Piper* v. *Chris-Craft Industries, Inc., supra*, 430 U.S. at 29, that neutrality "does not go either to the purpose of the legislation." But in *Piper* the Court was faced only with the question whether Congress' objectives in enacting the Williams Act permitted the court to "read into" the Act a private right of action for unsuccessful offerors (*id.* at 23). The Court merely found that the "congressional policy of 'evenhandedness' is nonprobative of the quite disparate proposition that the Williams Act was intended to confer rights for money damages upon an injured takeover bidder" (*id.* at 31). This case presents the different question whether a state law at odds with the neutrality policy obstructs the federal scheme. It involves consideration of Congress' objectives, not of the particular parties who can enforce the statute.

the date of commencement of an offer.[44] It does not require any pre-offer action, and it does not delay the offer. Proposals to require pre-commencement disclosure by a bidder of matters pertaining to a tender offer were hotly debated in Congress and ultimately rejected.

In October 1965 Senator Williams introduced S. 2731, a bill that would have subjected tender offers to advance disclosure requirements. 111 Cong. Rec. 28259 (1965). Section 2 of S. 2731 would have required a bidder to notify the target company and to file a public statement with the Commission containing essential information at least 20 days before the bidder could commence a cash tender offer that would result in the bidder's ownership of more than five percent of a class of the target company's securities.[45] Senator Williams described S. 2731 as "designed to prevent, through appropriate disclosure, cor-

[44] The commencement of an offer, thus defined, triggers the filing, disclosure, dissemination, withdrawal, proration and "best price" provisions of Section 14(d) of the Securities Exchange Act and the rules promulgated and proposed thereunder, all of which apply to a bidder. 15 U.S.C. 78n(d)(1), 78n(d)(5)-78n(d)(7). Existing Rule 14d-1 and proposed rules 14d-2 through 14d-7 in the Commission's recently published proposed tender offer rules (Release No. 34-15548, 44 Fed. Reg. 9956 (1979)) are to the same effect.

[45] The advance filing and disclosure requirement of the bill also applied to persons acquiring more than five percent of a class of securities in transactions other than tender offers. These acquisitions are the subject of Section 13(d)(1) of the Securities Exchange Act, 15 U.S.C. 78m(d)(1), which does not require the filing of such information until 10 days after the date of the acquisition.

porate takeovers by those interested merely in quick profits rather than legitimate operation of businesses." 112 Cong. Rec. 19003 (1966).

The bill as introduced aroused great interest at the Commission and in the business and financial community.[46] The Commission's report on S. 2731 stated: "[T]he requirement of a 20-day advance notice to the issuer and the Commission is unnecessary for the protection of security holders * * *" 112 Cong. Rec. 19005 (1966). The Commission suggested instead that a bidder be required to file a confidential statement with the Commission five days prior to commencement of the offer. Under the Commission's proposal, the statement would first be sent to the target company's management at the same time the tender offer was made to security holders. *Ibid.* The Commission's suggested revision was described by Chairman Cohen as designed to give the Commission "an opportunity to examine material to assure compliance with the law, but * * * not give an opposed management a period in which to mobilize its resources and take action against the offer, at a time when the offeror could not solicit tenders or otherwise make his case." Sowards & Mofsky, *Corporate Takeover Bids: Gap in Federal Securities Regulation*, 41 St. John's L. Rev. 499, 514 (1967) (citing M. Cohen, Address to the American Society of Corporate Secretaries, Inc., June 28, 1966).

[46] Although S. 2731 and its House counterpart, H.R. 14417, were referred to committee, no hearings on the bills were held, and neither committee voted on the legislation before the end of the 89th Congress.

A new bill, S. 510, was introduced in the 90th Congress, with a pre-commencement filing provision (Section 2(2)) like that suggested by the Commission. 1967 Senate Hearings at 7. During the Senate hearings, the Commission supported the confidential filing provision of S. 510 "since it would give the Commission an opportunity to review the statement and point out any inaccuracies or inadequacies before any soliciting material was published or sent to stockholders." 1967 Senate Hearings at 20 (testimony of Chairman Cohen). See also 1967 Senate Hearings at 184-186 (testimony of Chairman Cohen), 191-192 (testimony of Phillip Loomis). Representatives of major stock exchanges and other witnesses, however, voiced their disapproval of any pre-commencement filing with or review by the Commission.[47] Although these witnesses were concerned that leaks might occur before the tender offer was made, they also expressed concern about the potential for market disruptions (*id.* at 71) and market manipulations (*id.* at 72). One witness, Donald J. Calvin, Vice President of the New York Stock Exchange, testified (*ibid.*):

> If word of the impending offer becomes public, the price of the stock will rise toward the expected tender price. Thus, the primary inducement to stockholders—an offer to purchase their

[47] See *e.g.*, 1967 Senate Hearings at 71-76 (testimony of Donald J. Calvin), 84-85 (testimony of Philip West), 87-89 (testimony of G. Keith Funston) 98 and 105 (testimony of Ralph S. Saul), 108-111 (testimony of Robert W. Haack), 139-140 (statement of William H. Painter) 151 and 163 (testimony of Francis R. Schanck).

> shares at an attractive price above the market —is lost, and the offeror may be forced to abandon its plans or to raise the offer to a still higher price. The cost of an offer to purchase hundreds of thousands of shares might prove prohibitive if the price had to be increased only a few dollers per share.

In place of the pre-commencement filing and waiting period, these witnesses suggested a requirement that a bidder file an information statement with the Commission at the time it made its tender offer. See, *e.g.*, *id.* at 71.

In the end, Congress rejected any pre-commencement filing requirement. This legislative choice was explained in the Senate Report:

> At the hearings it was urged that this prior review was not necessary and in some cases might delay the offer when time was of the essence. In view of the authority and responsibility of the Securities and Exchange Commission to take appropriate action in the event that inadequate or misleading information is disseminated to the public to solicit acceptance of a tender offer, the bill as approved by the committee requires only that the statement be on file with the Securities and Exchange Commission at the time the tender offer is first made to the public.

1967 Senate Report at 4. When the House considered tender offer legislation in 1968, it also rejected a pre-commencement filing requirement.[48]

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[48] H.R. 14475 contained the same pre-commencement filing requirement as that in S. 510 as originally introduced. The

During deliberations on the Williams Act amendments in 1970, the House subcommittee again considered and rejected suggestions that there be pre-commencement filings for cash tender offers.[49] The House hearings included testimony and written submissions both for and against H.R. 4285, introduced by Rep. Monagan in 1969, which would have required that 30 days' advance notice of a takeover attempt be given to the Commission and the target company. See, *e.g.*, *Hearings on H.R. 4285 and S. 3431 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 7, 21, 67 (1970). The bill was not reported out of the subcommittee. S. Rep. No. 91-1125, 91st Cong., 2d

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Chairman of the Commission again testified in favor of a pre-commencement filing requirement. *Hearings on H.R. 14475 and S. 510 before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 17-18 (1968). The critics spoke out against it for the same reasons given before the Senate subcommittee. See, *e.g.*, *id.* at 44-46, 50.

[49] The 1970 amendments (Pub. L. No. 91-567, 84 Stat. 1497), expanded Section 14(d), 15 U.S.C. 78n(d), to cover stock-for-stock exchange tender offers, but they left undisturbed the applicable registration statement requirement of the Securities Act of 1933, 15 U.S.C. 77c-77h. This difference in treatment reflects the fact that a bidder making an exchange offer is selling securities. Therefore an effective registration statement for the bidders is required before an exchange offer can be made.

Sess. (1970).[50] The judgment of Congress is unmistakable: pre-commencement delay is inconsistent with the program of the Williams Act.

Appellants contend (Br. 26) that whatever Congress' intention was when it passed the Williams Act, Congress itself altered the balance by enacting Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a. This is incorrect. Congress expressly recognized in passing the Hart-Scott-Rodino Act that the "basic purpose" of the Williams Act is to ensure neutrality between offerors and target companies; Congress indicated its intent to avoid undermining that purpose. H.R. Rep. No. 94-1373, 94th Cong., 2d Sess. 12 (1976).[51] Rep.

[50] Two bills introduced in the 94th Congress would have amended 15 U.S.C. 78n(d)(1) to require a 60-day pre-commencement filing with the Commission. S. 2522, 94th Cong., 1st Sess. § 3 (1975); H.R. 10650, 94th Cong., 1st Sess. § 1 (1975). A third bill would have required such a filing at least 21 days prior to commencement, with contemporaneous transmission to the target company. H.R. 14317, 94th Cong., 2d Sess. § 5 (1976). None of these bills was reported out of committee. Responding to Senator Proxmire's request for comment on S. 2522, the Commission opposed the bill, concluding that it would provide incumbent management with time for defensive maneuvering, disrupt markets, and (by impairing the effectiveness of the tender offer mechanism and increasing the speculative risk of investors during the waiting period) hurt the interests of investors. Letter to Senator Proxmire from Chairman Roderick Hills, April 19, 1976, BNA Sec. Reg. and L. Rep. No. 351, A-3 (1976).

[51] The Report stated:

> [I]t is clear that this short waiting period [the 10-day period for pro ration provided by Section 14(d)(6) of the Securities Exchange Act, which applies only after a tender offer is commenced] was founded on congressional concern that a longer delay might unduly favor the target firm's incumbent management, and permit them to frustrate many pro-competitive cash tenders. This 10-day waiting period thus underscores the basic purpose of the Williams Act—to maintain a neutral policy towards cash tender offers, by avoiding lengthly [sic] delays that might discourage their chances for success.

Rodino explained to the House how the legislation bearing his name was designed to mesh with the Williams Act:

> In the case of cash tender offers, more so than in other mergers, the equities include time and the danger of undue delay. This bill in no way intends to repeal or reverse the congressional purpose underlying the 1968 Williams Act, or the 1970 amendments to that act. * * *
>
> Lengthier delays will give the target firm plenty of time to defeat the offer, by abolishing cumulative voting, arranging a speedy defensive merger, quickly incorporating in a State with an antitakeover statute, or negotiating costly lifetime employment contracts for incumbent management. And the longer the waiting period, the more the target's stock may be bid up in the market, making the offer more costly—and less successful. Should this happen, it will mean that shareholders of the target firm will be effectively deprived of the choice that cash tenders give to them: Either accept the offer and thereby gain the tendered premium, or reject the offer. Generally, the courts have construed the Williams Act so as to maintain these two options for the target company's shareholders, and the House

conferees contemplate that the courts will continue to do so.

122 Cong. Rec. H. 10293-10294 (daily ed. Sept. 16, 1976). Unlike the Idaho law, the Hart-Scott-Rodino Act regulates the acquisition of securities pursuant to a tender offer but does not affect the commencement of a tender offer. The filing and waiting period provisions of the 1976 Act must be satisfied prior to the bidder's acquisition of securities, which usually occurs at the termination of its offer. Thus, the 1976 Act does not affect the solicitation process during a tender offer; it affects only the date on which the bidder may "take-down" tendered securities. Because the 1976 legislation does not delay the commencement of a tender offer, it complements the operation of the Williams Act and does not upset its balance or authorize additional state legislation.

C. The Idaho Corporate Take-Over Law Frustrates Achievement of the Objectives of the Williams Act by Imposing Requirements Rejected by Congress as Inimical to Investor Protection

The Idaho Corporate Take-Over Law regulates tender offers in precisely the manner Congress rejected as being contrary to the welfare of investors. Once the jurisdiction of the Idaho statute is triggered, the law proscribes the commencement of any nonconsensual tender offer, either within or without the State of Idaho, until all the pre-commencement requirements of the Act have been satisfied (Idaho Code § 30-1503(1)). And, given the provisions in the statute for pre-commencement filings, mandatory

hearings, and inaction by the bidder until the offer is approved by the Idaho Director of Finance, the Idaho law creates substantial delay with respect to the commencement and prosecution of a tender offer.

The Idaho law requires a tender offeror to file a registration statement with the Director of Finance and to furnish a copy of that statement to the target company prior to the commencement of a tender offer (Idaho Code § 30-1503(1)). The Idaho statute does not prescribe a minimum or maximum waiting period between the filing of the registration statement and the commencement of a tender offer; rather, it prohibits the commencement of an offer, at any time, in any place, prior to the date the registration statement is approved by the Director of Finance. There is no requirement that the Director act on a registration statement within any particular time.[52] Prior to approving a registration statement, the Director may require the offeror to file additional information that the Director deems material to the offer (Idaho Code § 30-1503(3)).[53] The Director may summarily

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[52] Idaho Code, §§ 30-1503, 30-1503(4), and 30-1504. Section 30-1503(4) provides, in pertinent part, that "[a] takeover offer becomes effective when approved by the director." Cf. note 6, *supra*.

[53] The disclosure requirements of the Idaho law differ significantly from those of the Williams Act in some respects. Compare Idaho Code § 30-1503(2)(d) with Schedule 14D-1, 17 C.F.R. 240.14d-100. Although additional state disclosure requirements do not necessarily interfere with the federal scheme, in some cases compliance with such disclosure requirements could have the effect of obscuring the *material* disclosures in a tender offer (J.S. App. A-47). See 1967 Senate

delay the effective date of the offer if he determines that the registration statement does not provide full disclosure to offerees of all material information concerning the offer (Idaho Code § 30-1503(3)). Both of these powers were invoked by the Director in this case. Indeed, GWU was notified that the Department of Finance would not even deem its registration

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Hearings at 205 (testimony of Chairman Cohen); *Hearings on Regulations Under Federal Banking and Securities Laws of Persons Involved in Corporate Takeovers, Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 87 (1976) (testimony of Commissioner Loomis); E. Aranow, H. Einhorn & G. Berlstein, *Developments in Tender Offers for Corporate Control* at 219-220 (1977).

One specific disclosure provision of the Idaho statute—a requirement that a bidder who proposes to use borrowed funds in financing a tender offer disclose the identities of parties to the loan transaction (Idaho Code § 30-1502(1)(b))—could discourage banks from making credit available to a bidder for fear of adverse consequences of the disclosure of their role. (Although the Deputy Administrator of the Idaho Department of Finance agreed to GWU's request that the source of the funding for its offer be kept confidential (A. 81-82), he was not required to do so and there is no assurance that all such requests would be granted in the future.) The borrowed funds disclosure requirement not only has no counterpart in the federal statute or rules promulgated thereunder, but it was expressly rejected by Congress when it enacted Section 13(d)(1)(B) of the Securities Exchange Act, 15 U.S.C. 78m(d)(1)(B), made applicable to tender offers through the Williams Act. See, *e.g.*, 1967 Senate Hearings at 57-58 (testimony of Hayes); 63-64 (testimony of Cohen), 129-130 (statement of Fleischer). To implement the disclosure provisions of Section 13(d)(1)(B), the Commission has accordingly established a procedure whereby the identity of banks making loans in the ordinary course of their business to finance tender offers would not be made available to the public. Exchange Act Release No. 34-13787, 42 Fed. Reg. 38341, 38345 (1977).

statement to be "filed" until disclosure complying with the Department staff's requests was made (A. 85).

The commencement of a tender offer also may be delayed by the operation of the Idaho statute's hearing process (Idaho Code § 30-1503(5)). A pre-commencement hearing may be called by the Director if he deems it "necessary or appropriate;" such a hearing is always required if the board of directors of the target company so requests (Idaho Code § 30-1503(4)).[54] And "[i]f a hearing is called, the offer shall not become effective until registered by order of the director" (Idaho Code § 30-1503(4)).

The judgment of Congress concerning the best strategy for investor protection is frustrated by Idaho's law in several significant respects. First, the delay engendered by the state statute may have a "chilling" effect on bidders; this is antithetical to Congress' vision of an evenhanded regulatory scheme. By increasing the bidder's costs[55] the statute may cause the bidder to determine not to make a tender

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[54] The seemingly brief delays before and after the hearing provided under the statute do not mark the outer bounds of delay, because either or both of the 20- and 30-day provisions described in note 6, *supra*, may be extended if the Director so orders.

[55] For example, bidders frequently finance cash tender offers through borrowings. These loans are arranged in advance of the date of commencement and normally involve a daily financing fee. The pre-commencement delay increases the bidder's costs by requiring substantial payments to maintain the availability of the borrowed funds. See *Dart Industries* v. *Conrad*, 462 F. Supp. 1 (1978).

offer in the first instance and deprive investors of the opportunity to consider it (see 1967 Senate Report at 3). Second, the Idaho statute provides a target company with a generous degree of advance notice of a tender offer, and thus with additional time within which to take steps to combat the offer.[56] During this time the target management has the upper hand, because the offeror is forbidden from communicating its views to investors. By permitting incumbent management to call a hearing, the statute also allows the target company to control the extent of delay in commencement of an offer. Giving incumbent management the upper hand may frustrate the

[56] Among other things, such delay enables a target company to:

(1) repurchase its own securities, to make it less likely for the tender offeror to obtain control of the company;

(2) induce friendly third parties to make open market purchases of the target company's securities;

(3) announce dividend increases or stock splits;

(4) issue additional shares of stock;

(5) take steps to create an incompatibility between the target company and the tender offeror, for example, inducing possible antitrust violations should the tender offer be successful;

(6) seek to arrange a defensive merger;

(7) enter into restrictive loan agreements, with default to occur should the tender offer succeed; and

(8) institute litigation, challenging either directly or collaterally, the conduct or effect of the tender offer.

See, *e.g.*, E. Aranow and H. Einhorn, *Tender Offers for Corporate Control* 242-249, 254-258, 266-268, 274-276 (1973).

offer so that investors never receive the above-market prices the offeror was willing to pay.

The pre-commencement provisions of the Idaho statute cause the kinds of harm to investors that Congress foresaw. The pre-commencement filing is the practical commencement of a tender offer. The public nature of the pre-commencement filing disrupts markets by triggering behavior, such as arbitrageur activity, that normally accompanies a tender offer. During the pre-commencement period, security holders are confronted with a dilemma similar to that which prompted passage of the Williams Act. 1967 Senate Report at 1. While the bidder is unable to accept shares pursuant to the offer, shareholders —not knowing how long the pre-commencement period may extend or whether an offer will be made— are forced to consider selling their shares in the market. They make this investment decision without the benefit of full disclosure by the bidder.[57] Because the target company is free to disseminate any information it wants (and to withhold what it chooses to withhold), shareholders are deprived of the balanced and concurrent disclosure system Congress sought to establish in the Williams Act. Moreover, shareholders also are deprived of the Act's substantive protections. For example, Section 14(d)(7) of the Act, 15

[57] Publishing certain terms of the offer in a local newspaper and mailing a copy of the bidder's filing to the target company, as required in Idaho Code § 30-1503, might well bring the proposed offer to the attention of market professionals, such as arbitrageurs, but such actions would not be equivalent to mailing the tender offer to each shareholder.

U.S.C. 78n(d)(7), which serves to "lock in" the best price offered by a bidder, does not come into effect until the formal commencement of an offer, a formal commencement that Idaho seeks to postpone.

A scheme that can thus prevent the Williams Act from operating in the manner Congress intended cannot be saved by the claim that Idaho seeks to "protect" investors. Even if Idaho had that intent, the statute is not closely related to those goals (see pages 23-26, *supra*). Idaho's law and the Williams Act are at cross-purposes. Consequently, it is not relevant that Congress has not explicitly preempted all state takeover laws; it is enough that the state and federal schemes are incompatible. *City of Philadelphia* v. *New Jersey*, *supra*, 437 U.S. at 620-621 n.4. There certainly is no evidence that Congress approved state takeover laws; indeed there is no evidence that Congress was even aware of such laws when it enacted the Williams Act.[58] Congress thought

[58] In 1968, when the Williams Act was enacted, only Virginia had a takeover statute, and that statute had not been enforced. (Virginia's statute, Va. Code § 13.1-528, became effective on March 5, 1968 (Va. Acts 1968, c. 119); the Williams Act was enacted several months later, on July 29, 1968.) When Congress enacted the Williams Act amendments in 1970, Pub. L. No. 91-567, 84 Stat. 1497, Ohio and Nevada had passed takeover laws, but only the Ohio law had been enforced, and that occurred in the same month the amendments were enacted. Nev. Rev. Stat. § 78.376 - 78.3778 (1973), 2 CCH Blue Sky L. Rep. para. 31,151 - 31,169; Ohio Rev. Code Ann. § 1707.04.1 (Page 1977 Supp.), 2 CCH Blue Sky L. Rep. para. 38,104-1. There is no evidence in the legislative history that Congress was aware of these laws.

that it was filling a regulatory vacuum with a comprehensive and carefully balanced plan. It was not even aware of the existence of such state legislation. Compare *New York Telephone Co.* v. *New York State Dept. of Labor*, *supra* (Stevens, J.), slip op. 19-21.

In sum, Congress determined that requiring disclosure concurrent with the commencement of a tender offer is the most effective means of regulating tender offers for the protection of investors. This procedure strikes a balance between the interests of the incumbent management of target companies and the interests of bidders, and it assures shareholders the opportunity, at the critical time, to hear full and fair presentations of the case for selling to the bidder and the case for rejecting the tender offer.[59]

Senator Williams has, however, recently expressed his view on state takeover laws:

> Some of the state laws clearly interfere with the purposes and objectives of the federal legislation. Advance notice provisions, and requirements concerning the duration of offers, the pro-rata purchases of shares, and the withdrawal rights of shareholders either explicitly conflict with federal provisions on the same subjects or are obstacles to the accomplishment of objectives implicit in the federal statutes.

H. Williams, "Introduction" to E. Aranow, H. Einhorn, & G. Berlstein, *Developments in Tender Offers for Corporate Control*, *supra*, at xix.

[59] Appellants are wrong in contending (Br. 80-81) that the Commission's recently proposed tender offer rules (Release No. 34-15548, 44 Fed. Reg. 9956 (1979)) are inconsistent with this policy and adopt the approach of the Idaho law. Proposed Rule 14e-1, to which they specifically refer, would establish a minimum period of 30 business days for the dura-

Because the Idaho Corporate Take-Over Law frustrates the successful operation of this statutory policy, it must yield under the Supremacy Clause. *Ray* v. *Atlantic Richfield Co., supra; Jones* v. *Rath Packing Co., supra; Hines* v. *Davidowitz, supra.*[60]

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tion of a tender offer but would not delay its commencement. Proposed Rule 14d-6(b) would deem a bidder's public announcement through a press release, newspaper advertisement or public statement of certain material terms of a cash tender offer to commence the bidder's tender offer for purposes of Section 14(d) of the Securities Exchange Act, 15 U.S.C. 78n(d). The effect of the Commission's proposal is to trigger the operation of the Williams Act at the practical commencement of the tender offer, rather than to delay the commencement date as Idaho law provides. Indeed, adoption of proposed Rule 14d-6(b) would make it impossible for a bidder to comply with both the Commission's rule and the pre-commencement filing provisions of the Idaho law.

[60] The brief of the National Association of Insurance Commissioners, as *amicus curiae*, urges that state laws regulating tender offers for insurance companies are preserved by Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b). There is no need for this Court to consider the question, because Sunshine is not an insurance company. Cf. *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 457 (1969); *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, No. 77-952 (Feb. 27, 1979).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-759

DAVID H. LEROY, Attorney General of Idaho, and TOM D. MCELDOWNEY, Director of the Department of Finance of the State of Idaho,

Appellants,

vs.

GREAT WESTERN UNITED CORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPELLANTS' REPLY TO SEC BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-759

DAVID H. LEROY, Attorney General of Idaho, and TOM D. MCELDOWNEY, Director of the Department of Finance of the State of Idaho,

Appellants,

vs.

GREAT WESTERN UNITED CORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPELLANTS' REPLY TO SEC BRIEF

This brief in reply to the Brief for the Securities and Exchange Commission as Amicus Curiae is filed pursuant to permission granted appellants by the Court during oral argument on April 17, 1979.

The Interest of the Securities and Exchange Commission Has Not Focused on Areas Within Its Expertise

The Securities and Exchange Commission (hereafter "SEC" or "Commission") has a working familiarity with and understanding of the parameters of sections 27 and 28(a) of the Securities Exchange Act of 1934 [15 U.S.C. §§ 78aa and 78bb(a) (1970)] which might have aided this

Court in grapping with the thorny jurisdictional problems raised by attempts to define the words "violation" in section 27 and "conflict" in section 28(a) in a convoluted manner by the courts below. Instead, and in a manner that does not do justice to the concept of a "friend of the Court," the SEC asserts a posture under the Commerce Clause (wholly within the expertise of this Court) and under the Supremacy Clause regarding the constitutionality of state corporate takeover laws vis-a-vis the federal Williams Act with the aim of achieving a goal indirectly that it has been unwilling to advance to Congress or take directly by its own court challenge to state laws.

ARGUMENT

I

THE IDAHO CORPORATE TAKE-OVER LAW IS VALID UNDER THE COMMERCE CLAUSE.

A. State Laws Provide for Increased Benefits and Protections for Shareholders

Beginning at page 14, Brief of SEC, and continuing throughout, the term "delay" is given a negative connotation. In fact, the term "delay" is defined as an unproductive waste of time. Yet, what really happens in the context of cash tender offers is that state laws such as Idaho's create an *extended period of time for shareholder benefit* which results in additional time for deliberation and opportunity for an auction market and increased offer prices to occur. Even the SEC, as is discussed below, has now proposed an extension of time to complete a tender offer to 30 business days (42 calendar days)—a period in all likelihood longer than would occur under Idaho's statute.

Directors of a target company faced with a takeover bid have a fiduciary responsibility to shareholders to review that bid and do whatever is reasonably possible for the protection and best interests, as they view them, of those shareholders who look to them for management of the company. Corporate management must swiftly review and analyze the bid, reach a conclusion, and bring that conclusion to the attention of shareholders as part of their fiduciary responsibility. Time is needed for such consideration. Shareholders may get together and advance individual or group interests to other shareholders regarding a tender offer proposal if they have time in which to act. Yet, the availability of the "Blitzkrieg," or "Saturday night special," short-fused tender offer under the Williams Act, where the bid is a surprise and of short duration, puts immense pressure on shareholders to react. It places even greater pressure on target company management, including its board, to hastily analyze the bid, determine its recommendation, and communicate with shareholders. If this review and comment process must be completed in only a few days it will be done in a less satisfactory manner than if there is adequate time. Often, boards of directors are composed of persons who live in different parts of the country (and on occasion include foreign residents). To bring a large board of directors together to give careful consideration to their responsibilities in a takeover situation takes time, not only to comply with its by-laws to assemble the members, but also to give them adequate information and seek their decision. Federal law, as it now stands, does not allow target company management to exercise their fiduciary role in a considered, responsible manner, nor does it allow the shareholders time to study the situation or to communicate with each other.

Within the confines of the Williams Act, a partial tender offer need only be kept open for the ten day proration period and a full tender offer need only be kept open for the seven day withdrawal period. If a tender offeror chose to announce its takeover bid on a Friday, then four out

of the ten days would be non-business days (weekends), leaving only six business days during which a partial offer must remain open. Such a brief period hardly creates an opportunity for effective, meaningful communication with shareholders by target management, and can easily lead to panic tendering. [See A. at 221-22 (Bartell); 248-52 (Wheat); Trial Tr. at 354 (Chatlos).]

Clearly, a principal reason why a takeover bidder wants to be able to operate within the brief time limits of the existing Williams Act provisions is to be able to get the desired shares more cheaply, before an auction market can arise. Coupled with this desire is the prospect of panic tendering by shareholders who know little about the offeror and would rather tender or sell their shares to arbitrageurs than remain shareholders in a company with an unknown future.

A further point, apparently misunderstood by the SEC and the appellate court below, is the unwarranted assumption that *all* information gathered as a result of additional disclosure requirements of Idaho law *must* be disseminated to shareholders. As the circuit court noted: "in the area of financial disclosure it can be true that 'less is more'. Disclosure of a mass of irrelevant data can confuse the investor and obscure relevant disclosures." [J.S. App. A-47]. What the court fails to recognize, however, is that the Idaho Corporate Take-Over law, while providing for thorough disclosure by a tender offeror, contains no mandate that unwieldy, unimportant, masses of information be sent to investors of the target company. The information must be filed with the Idaho Department of Finance and be available to investors. A material synopsis of the filed information could then be sent to shareholders either by the tender offeror or by the target company—and shareholders would be protected from false statements or omission of material facts by prohibitions in the Idaho law against fraudulent or deceptive practices. [IDAHO CODE § 30-1505(1)

(Supp. 1978).] Such action would also be consonant with fiduciary obligations of target company management.

At Footnote 42, Brief of SEC, the Commission claims it has asked for fuller disclosure in at least three cases. When contacted by counsel for appellants in this case in an attempt to ascertain when the filings were made and what in the filings prompted the Commission to seek the additional disclosure, SEC personnel would provide no information whatsoever about the three named filings, and counsel was informed that if additional information was desired it would have to be sought through the federal Freedom of Information Act. If counsel for this case before the Supreme Court of the United States cannot obtain information about these filings after the subject has been raised by the SEC itself, it is obvious that it would be a virtual impossibility for a target company shareholder to obtain any such information without great difficulty and in time to be of any material aid in deliberation over action he should take regarding his target company stock. Since the SEC is unwilling to timely provide the material for response by appellants, the appellants request that the Court strike its Footnote 42 and the references therein.

B. Idaho's Law Only Indirectly Affects Interstate Commerce

Federal and state laws interrelate in a variety of areas regarding securities matters where interstate commerce is indirectly or incidentally affected. The Idaho Corporate Take-Over law does not create a unique effect or relationship. Such joint activity applies in the regulation of broker-dealers, required to be licensed by and regulated by the laws of many states and also required to be registered under federal law.

More specifically with regard to changes in corporate control, in the area of proxy contests—an area which may change corporate control—there is a substantial federal

law requirement that sets forth proxy rules, yet there is often some, though less, state law regulation of that process. Exchange tender offers, too, were regulated by federal law prior to the 1968 passage of the Williams Act. If the bidding company was a reporting company under the N.Y.S.E. and the SEC's rules, in order to make an offer of its securities in an exchange tender offer it would have to file a registration statement and have pre-tender processing of the registration statement by the Commission staff. The offer would become effective only after that processing was completed; then the tender could be made. State law also governed (and continues to govern) exchange tender offers. [See Appendix to Appellant's Reply Brief where requirements of Idaho law regulating exchange tender offers are compared to requirements of the Idaho Corporate Take-Over law regulating cash tender offers.] The issuance of securities and the sale of those securities in particular states involved in an exchange tender offer are regulated by many states through the process of either requiring a permit for the issuance and sale of those securities or requiring qualification under the state law with, in many instances, disclosure requirements included in the state law. Thus, at the federal level the extent of federal involvement was full and fair disclosure, whereas at the state level there was a traditional variety of blue sky regulations which might require full and fair disclosure and might even go so far as regulating the fairness of the offer itself.

At the time of adoption of the Williams Act the distinction between the existence of statutory provisions at both the federal and state level for exchange offers and the lack of laws regulating cash offers was fully recognized both by Congress and the SEC; it was an obvious fact. In the initial 1968 version of the Williams Act there was an express exemption for exchange offers made by means of a registration statement, it no doubt being the belief of Congress that in adopting minimal regulation

of cash tender offers they would confine themselves to that medium of tender offer (cash) which had no regulation at the federal level, coupled with Congress' recognition that exchange tender offers did have substantial regulation at both the federal and state levels. Then, in 1970, the exemption was removed and the Williams Act was amended to include within its ambit tender offers of securities registered under the 1933 Securities Act (exchange tender offers).

It, therefore, seems fair to say that in the securities law area, at least, federal and state laws may be different in dealing with the same subject, yet federal law does not oust state law, and state law has not been deemed unduly to burden interstate commerce. Perhaps a prime example of this coexistence is federal law under the Securities Act of 1933 on the issuance and sale of securities, with its extensive disclosure requirement and process, and state law regulating issuance and sale of securities, which include both a disclosure requirement and requirements of findings of fairness by state regulators. Both deal with the same subject, yet they are different in their emphasis, and both are for the same purpose.

In all of the above mentioned fields of dual state and federal regulation, the state laws involved have an extraterritorial effect that extends beyond the boundaries of the regulating state to affect offerors, proxy solicitors, or shareholders wherever they may live. Yet, in none of the described areas can the SEC point to authoritative decisions that the state laws unduly burden interstate commerce.

Though Idaho's, and other, state takeover laws have an extraterritorial reach that the SEC claims is unique, the state laws are analogous to statutes and the common law relating to mergers. If a change in corporate control is to be effected by a merger, federal law requires a registration statement and a process of review of the proxy mate-

rials sent to the shareholders who must vote on the merger, while state law continues to govern the internal affairs of the company, the vote that is required. In some instances, state blue sky laws may require qualification of the issuance of any securities in the merger. In a cash tender offer, the state's concern is seriously implicated with whether or not the offer is extended to shareholders who happen to live in Idaho. The interest of Idaho target shareholders certainly is affected by a tender offer extended only to shareholders who live outside the state. Not only would they not be able to tender directly, but the resulting change in corporate control of the target company would also directly affect their shares.

The concern of Idaho in the welfare of domestic and pseudo-foreign corporations in Idaho and in the welfare of all investors in those companies regardless of where those investors may reside is implicated without regard to whether the tender transaction actually occurs inside or outside Idaho. In tender offers, unlike blue sky legislation, Idaho's *concern* is for the shareholders or owners of corporations with a strong nexus to Idaho, period. And for that reason, the extraterritorial effect or reach of Idaho law is wholly incidental.

The Idaho Corporate Take-Over law merely reaches through the fiduciary relationship of target company management to its shareholders to extend shareholder protection wherever the shareholder may live. The Idaho law is not designed to favor any one bloc of shareholders at the expense of any other and, in fact, prohibits offers that do not treat shareholders substantially equally. [IDAHO CODE § 30-1506(1) (Supp. 1978).] The Commission, at p. 33, Brief of SEC, criticizes the spectre of a multiplicity of state laws as "burdensome," yet at oral argument Great Western conceded that state laws would be constitutional if they only affected shares held by local residents. The Idaho law was structured to avoid such an overlap by defining a "target company" in a way that Idaho law would not be effective unless such a company had a most substantial —paramount—relationship with Idaho.[1] Traditional comity and deference principles which have worked well for years among states in other aspects of securities law should preclude a tender offeror from being subjected to a multiplicity of laws it must abide by. And, by having a law of at least one state where the target company has a substantial relationship govern a cash tender offer in a way that protects all target company shareholders wherever they reside, a tender offeror is precluded from seeking out only those states where a preponderance of the target shareholders reside and making its tender offer in those states to the exclusion of shareholders in other, less populous, states.

While in the instant tender offer for Sunshine Mining Company stock the planning took place in Texas, the offer was announced and handled by investment bankers in New York, and the shares were to be tendered to a Chicago, Illinois, bank, all Sunshine shareholders had a right to look for information and protection from the State of Idaho reaching through to them from the fiduciary relationship Sunshine's management in Idaho had to all shareholders.

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[1] A "target company" is defined at IDAHO CODE § 30-1501(6) and is either:

(a) a company organized under Idaho law; or

(b) a company which

(i) has its principal office in Idaho, and

(ii) has substantial assets located in Idaho, and

(iii) whose equity securities are registered under Idaho law or § 12 of the 1934 Securities Exchange Act

which is or may be involved in a takeover offer relating to any class of its equity securities.

C. State Takeover Laws Have Not Discouraged Tender Offers, for Just as the Number of State Laws has Increased, so has the Number of Tender Offers

Since passage of the Williams Act tender offers have increased, particularly in the last few years, while, at the same time, more states have enacted takeover laws. Based on tender offer reports filed with the Securities and Exchange Commission during the fiscal years 1969 to 1977, the following information emerges:[2]

Fiscal Year Ending June 30	No. of Tender Offers Filed with SEC	No. of State Takeover Laws Existing
1969	70	1
1970	34	2
1971	43	2
1972	50	3
1973	75	3
1974	105	5
1975	113	8
1976[3]	134	20
1977	134	30

Analysis of contested tender offers for corporate control during the years 1976 to 1978 indicates that state takeover laws not only have not discouraged takeover attempts, but

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[2] Data on tender offer filings was derived from the Securities and Exchange Commission's Thirty-fifth through Forty-third Annual Reports. The Commission reports on its activities on a fiscal year, not calendar year, basis. No data has as yet been published by the Commission for its 1978 fiscal year.

[3] In 1976 Congress changed the Government's fiscal year, so that thereafter the fiscal year would end on September 30 rather than June 30. In its Forty-Third Annual Report the SEC reported not only on the 134 tender offers filed in fiscal year 1977, but also reported that 27 tender offer reports had been filed during the transition period between June 30 and September 30, 1976.

also that the bidding price was increased in over half the cases where bids were subject to state takeover laws, yet rarely increased in states without takeover laws.[4] No evidence was introduced by Great Western at trial that any tender offers had been discouraged or defeated as a result of state law. The SEC chose not to participate at trial of this case, and has referred to no evidence of any discouragement or defeat of tender offers by state laws. There is simply no evidence anywhere to indicate that a tender offer was ever not made because of a state takeover

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[4] Analysis of Contested Tender Offers for Control

	1976	1977	1978
No. of Tender Offers for Control			
States with statutes	13	26	42
States without statutes	9	8	3
Total:	22	34	45
No. of Tender Offers in Which Target was Ultimately Acquired			
States with statutes	12	26	41
States without statutes	8	8	3
Total:	20	34	44
No. of Tender Offers in Which Bid was Increased			
States with statutes	7	10	19
States without statutes	4	5	0
Total:	11	15	19
No. of Tender Offers in Which Bid was Increased with no Competitive Bid			
States with statutes	0	5	9
States without statutes	0	3	0
Total:	0	8	9

Source Admitted as Defendant's Exhibit "G" in *Tyco Laboratories, Inc.* v. *Connelly*, No. CA No. 79-0265-T (D. Mass., March 26, 1979).

law, nor is there any evidence to indicate that any tender offers were not made because of the Williams Act. Yet, the SEC continues to postulate that state laws discourage tender offers. At Footnote 21, Brief of SEC, the Commission claims that there is no practical way of testing whether or not state takeover laws have discouraged tender offers. If this is a valid contention, then we should also speculate about how many potential tender offers were discouraged by any negative effect the Williams Act may have. The fact remains that tender offers *have* increased as the number of state statutes has increased.

Assuming arguendo that there might be a deterrent effect on some tender offer bidders as a result of state law provisions, it is well to discern the character of such a potential bidder. If the bidder is one who wants a Saturday night special or blitzkreig opportunity without having to disclose carefully or fully and is not interested in anything else—if he wants to get a bargain with an unfair advantage and if that advantage is not available—he might pass up the opportunity to bid, for state laws tend to make gaining a bargain and a purchase at the expense of the target company shareholders a little more difficult, since the time period allowed for shareholders to make up their minds and for other bidders to come forth (if there are any), together with any additional information required of the tender offeror, might deter that sort of a tender offer. But on the other hand, additional time permits prudent management of other potential bidding companies to participate in any resultant corporate auction and may, in fact, increase the pool of offerors. This, too, is purely speculation, yet is certainly at least as reasonable as the SEC's speculation.

At page 27, Brief of SEC, the Commission indulges in the presumption that the Idaho Director of Finance (because of a lack of a "standard") would act to the detriment of target company shareholders or in favor of target

management when, in fact, there is no reason to believe that the state official would act in any but a neutral manner in seeking additional information and protection for target shareholders. Certainly, the facts herein support only a conclusion of fair, neutral dealing. Great Western does not claim that the additional information sought would not be of benefit to shareholders or that it somehow would give unfair advantage to target management; all that it claims is that it did not want to supply the additional information.

D. The Idaho Corporate Take-Over Law Benefits Shareholders

At page 31, Brief of SEC, the Commission asserts that the Idaho law burdens prospective takeover bidders in several ways. So, too, does the Williams Act "burden" takeover bidders, and, presumably, the proposed SEC 30 business day rule (holding tender offers open for 42 calendar days)[8] will undoubtedly additionally "burden" tender offerors. But, the object of the state and federal laws is protection of and benefit to shareholders of a target company, not minimum burden to a tender offeror—and none of the "burdens" of either state or federal law act to frustrate an offer, for offers continue increasingly to be made.

Next, the SEC complains that the Idaho law "burdens" arbitrageurs because it imposes a longer period during which the arbitrageur is "at risk" than does the Williams Act. [Brief of SEC at pages 35-36.] Certainly, the state laws regulating takeovers are not designed to be "arbitrageur relief acts," nor is that a purpose (though it may be an effect) of the Williams Act as presently constituted. Since the SEC now proposes longer periods during which

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[8] Securities and Exchange Commission Release Nos. 33-6022; 34-15548; IC-10575; File No. S7-770 dated Feb. 5, 1979 (17 C.F.R. Part 240).

tender offers must remain open under the Williams Act, complaint about "delay" under state law seems ill-founded. On the contrary, those arbitrageurs who hold their target company stock during an extended period of time created by state takeover law would also benefit from any increased bid or auction market which the extended period fostered.

Empirical studies demonstrate conclusively that extended periods of time during which tender offers remain open foster entry into the market of competing tender offerors and increase pressure on the initial bidder to raise his bid. A study of contested tender offers during the years 1976, 1977, and 1978 in which time was a factor in affecting the price bid for target company stock is reproduced as an ADDENDUM to this Brief.[6] By merely laying a ruler vertically along the line representing days of time it becomes readily apparent that an extended period of time during which a tender offer remains open results in a premium to shareholders. Between November 1974 and the end of 1978 the additional premium to shareholders from this "delay" has been over 1.2 billion dollars.[7]

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[6] Information compiled by William E. Chatlos of Georgeson & Co.; admitted as Defendant's Exhibit "H" in *Tyco Laboratories, Inc.* v. *Connelly*, No. CA No. 79-0265-T (D. Mass. March 27, 1979).

[7] SUMMARY OF COMPETITIVE TENDER OFFERS

Year	Bids	Average Number of Days From Original Announcement To Final Bid	Mean Number of Days To Completed Offer	Median Number of Days To Completed Offer	Total Premium Over Bid
11/'74—12/'76	37	30.5	52.2	46.5	$ 178.7m
1977	19	59.8	110.8	80	$ 662.9m
1978	40	56.1	92.8	82	$ 362.4m
					$1,204.0m

Source: Distillation of information contained in ADDENDUM to this Brief; Testimony of Mr. Chatlos, (Trial Tr., 374) (A. 288-89); Chatlos, *The SEC vs. investors on tender offers* in Ideas for Action, HARV. BUS. REV. 6, 7 (Sept.-Oct. 1978).

II

THE WILLIAMS ACT DOES NOT PREEMPT THE IDAHO CORPORATE TAKE-OVER LAW.

Nothing in the Williams Act or its legislative history indicates an intent to preempt state securities regulation of corporate takeover bids. To the contrary, the legislative history of the Williams Act demonstrates that Congress expected state law regulation in the same area.[8] The SEC itself informed Congress that it chose to defer to the

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[8] The SEC recommended as an amendment what was passed in 1968 as section 14(f) of the Williams Act regarding agreements about directors being replaced. But the SEC, at whose suggestion this amendment was made, recognized the new provision would not supersede state law, and that the ordinary rule of section 28(a) would apply. The applicable comment states:

> Our proposed amendment would not supersede the provisions of state law permitting the substitution of directors without a meeting of stockholders; it would simply assure that the type of disclosure made to stockholders prior to a meeting to elect directors would similarly be made available to them in this situation.

Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Commerce, 90th Cong., 1st Sess. 40 (1967).

Speaking during the 1968 House of Representatives hearings on what was to become the Williams Act, New York Stock Exchange official Donald L. Calvin noted:

> Mr. CALVIN. In addition, all statements filed with the SEC would be subject to current provisions of State and Federal securities laws, which would protect those shareholders whose shares are being solicited by a tender offer from fraudulent and deceptive practices.

Hearings on H.R. 14475 and S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 90th Con., 2d Sess. 49 (1968).

States in an area that directly affected the "balance" between the offeror and the target company.[9]

When Congress acts in an area in the face of existing state laws and says nothing about an intent to oust those laws or to prevent further state laws or to occupy the field, this Court should not infer an intent to preempt.[10] In fact, congressional silence in the face of state laws in the field should be interpreted as congressional approval of those laws.

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[9] In a 1970 dialogue between Senator Packwood, Mr. Loomis (who was at that point general counsel of the SEC), the following transpired:

> Senator PACKWOOD. When similiar legislation was being considered in 1968 there was some question whether the SEC had authority of tender offer [sic.] to insist that management provide a bidder with a stockholder list. To round off the record of those hearings, I would appreciate it if you could inform us whether the SEC possesses such authority today and whether it has been exercised. If not, do you not think in all fairness to all bidders that these should be made available? Could this authority be vested in the SEC pursuant to the rulemaking provisions which are incorporated in this bill?
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> • • • • • •
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> Mr. LOOMIS. The Commission does not now exercise the power to require the company to furnish the bidder a stockholders' list. We leave that to State law which generally governs when someone can get a stockholders' list. There is some question, and I think some difference of opinion among the Commission staff, as to whether under present law we have this power. It might be that enactment of this legislation would increase the likelihood that we have it, but there is a serious question of policy as to whether we should intervene, so to speak, on behalf of the bidder and require the management against its will to provide him with a stockholders' list rather than leaving that to the State courts.

Hearings on S. 3431 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 91st Cong., 2d Sess. 27-28 (1970).

[10] *See* New York Telephone Co. v. New York State Dep't of Labor, 47 U.S.L.W. 4303 (U.C. S.Ct., March 21, 1979).

To make out a case of implicit preemption there must be a clear showing that Congress intended to occupy the field, and such a contention is belied by the existence of section 28(a) of the Securities Exchange Act of 1934 [15 U.S.C. § 78bb(a) (1970)] with its recognition of the right of nonconflicting state laws to coexist with federal law in the securities field as well as the traditional interrelationship between state and federal securities laws. There is clearly no explicit preemption, either.

All that is left is operational or conflict preemption, and for that to be found there must be an unambiguous, demonstrable frustration of a clear and significant congressional purpose.[11]

When Congress passed the Williams Act in 1968, Virginia already had a takeover law. When Congress amended the Williams Act in 1970 there were three state takeover laws. And, in the 1970 amendments Congress did affect state jurisdiction in that it eliminated the exemption for exchange tender offers that existed in the Williams Act as originally passed. Congress had to be cognizant of the fact that exchange tender offers were subject to state blue sky laws, yet it took no action with regard to applicability of state law and added a layer of federal regulation to the layer of state regulation—and thereafter the two have coexisted.

In 1975, with 11 state takeover laws extant, Congress made it clear that it was focused on preemption in a related area when it amended section 28 of the Securities Exchange Act of 1934 to add subsection 28(e) [15 U.S.C. § 78bb(e) (1976)]. The new subsection authorizes a person exercising investment discretion (an investment advisor), if he does so in good faith, to pay a larger commission to one broker in the purchase and sale of securi-

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[11] *See* Tribe, *California Declines the Nuclear Gamble: Is Such a State Choice Preempted?*, 7 ECOLOGY L. Q. 679, 688-93 (1979).

ties than he might have paid to another. The investment advisor, in a fiduciary role, need not seek the very lowest commission if he in good faith believes that the commission was reasonable in relation to the value of the brokerage and research provided by the broker. Section 28(e) expressly preempted pre-1975 state law regarding breach of fiduciary duty and expressly permits post-1975 legislation, state or federal, which would be in conflict with the newly-added § 28(e) provision. Further, in the Securities Act Amendments of 1975, Congress added section 13(f) [15 U.S.C. § 78m(f) (1976)] to the Williams Act, requiring disclosures by various kinds of institutional investors of a certain size. The 1975 amendments to the Securities Act were characterized by Congress as one of the most extensive reviews of the Securities Exchange Act of 1934 ever undertaken, yet Congress failed to affect or displace state takeover laws.

In 1977 the Williams Act was amended again, at a time when there were over 30 state takeover laws. Section 13(d) [15 U.S.C. § 78m(d) (1978)] was amended to add more background information about the beneficial owners of securities, and two new subsections were added to section 13. Section 13(g) for the first time required all persons holding over a certain percentage of stocks to file with the SEC a report concerning their stock holdings (with the report to be filed on SEC Form 13g). Section 13(h) imposed on the SEC an obligation to study the 5% threshold (lowered in 1970 from the 10% threshold set in the original Williams Act in 1968) and to advise Congress whether the threshold should be lowered to something below 5%. These amendments were enacted in December 1977, yet there was no discussion in Congress or otherwise about preemption of state tender offer laws.

At Footnote 50, Brief of SEC, comments from SEC former Chairman Roderick Hills in a 1976 letter to Senator Proxmire to the effect that precommencement filing

would provide incumbent management with a defensive tool, disrupt markets, and hurt investors are noted. If the SEC is truly concerned about state takeover laws, and believes they are or ought to be preempted, why did the SEC not propose in this 1976 letter or at any other time when Congress was considering the 1934 Securities Exchange Act that Congress address the preemption issue?

Thus, Congress has on four occasions looked at this general area as well as conducting a comprehensive review of the Securities Exchange Act, but has not seen fit to affect the applicability of an increasing number of state statutes. Nor is there any suggestion that Congress perceives any conflict between state laws and the Williams Act.

Recent decisions by this Court make it clear that conflict preemption cannot be based on a speculative intention between state and federal provisions or even on a demonstrated incompatibility between state law and a hypothesized, unclear purpose of federal law.[12] For conflict preemption to be found there must be a convincing showing of empirically demonstrable incompatibility between a provision of state law and a clearly articulated significant purpose of federal law. Since *Piper* v. *Chris-Craft*[13] shows that protection of target company shareholders was the purpose of the Williams Act, preemption analysis poses the question whether there is some clear showing that this purpose of benefiting target company shareholders by giving them a fair opportunity to consider the possibility of tendering or selling all or a portion of their shares is demonstrably frustrated by state takeover laws. While

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[12] *See e.g.* Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977); Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117 (1973); New York Dep't of Social Services v. Dublino, 413 U.S. 405 (1973); Goldstein v. California, 412 U.S. 546 (1973). *See also* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977).

[13] Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977).

the Idaho law promotes neutrality, even if it did not it would be valid. "Neutrality" was an attribute, or side effect, of the Williams Act, not one of its purposes.[14]

Congress regarded the deterrence of some takeover bids as tolerable if that was a necessary price to pay for the paramount goal of investor protection, for it was said both in the House and Senate Reports as well as by Senator Williams on the Senate floor that:

> While the bill may discourage tender offers or other attempts to acquire corporate control by some who are unwilling to expose themselves to the light of disclosure, [the committee believes] this is [but] a small price to pay for adequate investor protection.[15]

Yet there is no evidence that either federal or state law has actually deterred tender offers, and evidence of increased numbers of tender offers in recent years indicate that the field is active and healthy under both federal and state regulation.

This Court should focus on the gain to shareholders from added disclosure and added time to consider an offer, coupled with the distinct possibility of additional, higher offers which may occur during an extended consideration time.

A. Idaho Law Does Not Favor Target Company Management

At Footnote 45, Brief of SEC, the Commission asserts that the Idaho law favors target company management at the expense of shareholders. This is patently false. This is the *only* case where Idaho law has been applied (and

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[14] *Id.* at 29.

[15] H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968) and S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967) [adds the phrase "the committee believes"]; 113 Cong. Rec. 24,664 (1967) (remarks of Sen. Williams) [adds "but"].

it resulted in a successful takeover in which Great Western *chose to retain* the target company management). National experience shows that over 85% of all tender offers are successful (and no pattern can be discerned as to the reasons why any tender offers are unsuccessful).[16] The SEC has had ample opportunity to study state law effect on tender offers and to analyze friendly tender offers under state laws such as Idaho's which exempts friendly offers from state law coverage, yet can name not a single instance of a friendly, exempted takeover—or even a hostile takeover—which has occurred at the expense of shareholders. After eleven years of experience under the Williams Act the SEC cannot yet even define what a tender offer is for federal law purposes.

Both the SEC and Great Western express extreme concern over the fact that a "friendly" tender offer, approved by management of the target corporation, is excluded from coverage of the Idaho Corporate Take-Over law. [Idaho Code § 30-1501(5)(e).] What the complainants fail to point out, however, is that such a cash tender offer *will* be subject to the Williams Act both as it presently stands and as it will be affected by the SEC's proposed 30 business day rule (and other proposed rules) should such rules become effective. Clearly, this exemption under state law

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[16] A leading authority in the investor relations field and unchallenged witness at trial of this case notes:

> The SEC's obsession with entrenched management proved to be an argument made of stale pudding. A study of the death rate of target companies in the years prior to the passage of the Williams Act revealed a mortality rate of 75% in tender offers.
>
> Under the SEC's jurisdiction since then, the rate has risen to 85%. One must wonder whether the end game envisioned here was benefit of investors or a 100% mortality rate of target companies.

Chatlos, *The SEC vs. investors on tender offers*, in Ideas for Action, Harv. Bus. Rev. 6, 6 (Sept.-Oct. 1978).

is a recognition that federal law effectively regulates the friendly tender offer in a context where the State of Idaho does not wish to add an additional state law overlay to the existing fiduciary responsibility of target company management to act in a proper manner in approving a tender offer proposal.

To claim, as it continues to do, that state takeover laws somehow protect "entrenched," "inefficient" target company management seems a bizarre act on the part of the SEC in reiterating a shopworn rubric last suggested in 1967 congressional hearings. Experience under federal and state takeover laws prove the contrary. The statement is bizarre for another reason; for in a system of cooperative federalism if any jurisdiction is deemed to have an exclusive right to be concerned with a particular topic it would surely be the State of Idaho with respect to the efficiency and effectiveness of corporate management in Idaho. To invoke Idaho's concern with corporate efficiency in that State as a basis for striking down the Idaho Corporate Take-Over law in the name of either the Commerce Clause or the Supremacy Clause would be to turn federal-state relations inside out in the face of increasing solicitude for state autonomy on the part of this Court.

With an over-85% success rate for tender offers, the successful bidder can do what it will with target company management. And, the "entrenched," "inefficient" target management rubric fails for other reasons, too. In many instances tender offers are made for companies with very efficient, successful management with an excellent record. Often, selection of the target company is based not so much on the efficiency of the management as on the level of price of its stock in relation to its earnings or the worth of the company. This fact is a direct result of occurrences in the securities markets in recent years where there has been a heavy concentration of institutional interest and investing in only the largest companies, whereas smaller companies with excellent records have had little institutional interest.

Withdrawal of individual investors from the market has caused prices of these smaller companies to be depressed and not to reflect their intrinsic worth. So, they become natural targets because a bidder can afford to offer a substantial premium over market and still buy the company at what it perceives to be a favorable price—often allowing sufficient price latitude that the bidder can afford to raise its bid. [*See* Trial Tr. at 252-53, 268-69, 307 (Wheat); 336-39, 357, 360-62 (Chatlos).]

Excellence of management of many of these smaller companies has not been reflected in market price in recent years. Yet another factor for starting a tender offer is the opportunity to make money out of the tender offer "business" itself. If a target company has a market price which is relatively low in relation to what is perceived as its net worth, a tender offeror may open bidding at a premium which is less than it conceives other interested bidders may wish to bid. If the offeror comes out with an unfriendly offer with a fair expectation that some other company may well enter the bidding and top its bid, it will lose the challenge for control if it is unwilling to raise its opening bid to compete with another bidder. But the successful bidder will pay the higher price to the initial offeror which has purchased (up to 5% before the Williams Act or state laws are "triggered") target stock at a lower price. Thus, the initial tender offeror may make several million dollars profit on its decision to get the tender offer market into action.

Finally, the postulate that management is somehow "entrenched" or "inefficient" merely because it happens to belong to a target company bears its own illogic once one realizes that some target companies are also tender offerors (which, by converse reasoning, must have "efficient" or "unentrenched" management). A classic example of this illogic is Daylin, Inc. which in recent years unsuccessfully attempted takeover bids for control of Uarco,

Dymo Industries, and Narco. During its 1974, 1975, and 1976 fiscal years, Daylin incurred a net operating loss which resulted in 101 million dollars of federal tax operating loss carryovers. In February, 1975, Daylin filed a Chapter Eleven petition under the federal Bankruptcy Act, which proceeding was in effect until the end of October, 1976. At the end of its 1976 fiscal year, Daylin faced the prospect that 66 million dollars of its tax loss carryovers would expire at the end of its 1980 fiscal year if not used by that time. Predicting that its own "earnings" picture would not provide enough revenue to fully utilize this large tax advantage, Daylin contacted the investment banking firm of First Boston Company seeking potential cash tender offer acquisition candidates. During the course of its third unsuccessful tender offer attempt, for control of Narco, Daylin was itself the subject of a successful tender offer whereby W.R. Grace and Co. gained control of Daylin.

B. Idaho's Prefiling Provision Does Not Create a Conflict

Congressional failure to enact a prefiling provision after considering it is not evidence of a conflict between state and federal law. In lawmaking, many proposals are made and ultimately not accepted. It would be very awkward constitutionally to treat all those provisions that *did not* make their way into a final bill as though they represented a clear congressional judgment that those particular measures were undesirable ones. This Court could not make a judgment striking down a state law as a result of a collage of discarded provisions on the congressional cutting room floor and hope to maintain a consistency in the respect due to the states in the federal system.

There were reasons for rejecting the prefiling language proposed for the Williams Act that do not suggest conflict between the final version and state takeover laws. Both the New York and American Stock Exchanges submitted

statements to Congress that the proposed 5 day prefiling period might result in unfairness to those investors who did not get the benefit of being covered by federal law protection during the prefiling period. State law provides that protection. Finally, federalism teaches that there are many things Congress might not want to include in a federal bill or in the powers of federal agencies that it might not object to at the state level. Certain matters do not rise to a level where Congress wants to include them in national legislation, but would rather leave matters to the states. The mere fact that Congress did not pick up a particular provision does not tell us that Congress meant for the states not to do it; it only tells us that Congress was neutral on that issue.

On page 58 and Footnote 56, Brief of SEC, the Commission promotes the contention that target management benefits from advance notice of a tender offer by being able to take steps to attempt to defeat the bid. The challenge to the SEC is to demonstrate, as they have failed to do, that these actions have in fact defeated any tender offers. The SEC list of possible actions target management might take to attempt to defeat a tender offer at Footnote 56 of its Brief is not nearly as inclusive as the list already presented at pages 100 to 102 of Brief for the Appellants, and none of the actions on either list are predicated on a target company having advance notice of a tender offer or being subject to a state takeover law. With an 85% success rate in takeover bids, any "tools" available to target management hardly seem "effective."

Again attacking precommencement filing, at pages 58 and 59, Brief of SEC, the Commission claims: "Giving incumbent management the upper hand may frustrate the offer so that investors never receive the above-market prices the offeror was willing to pay." This statement is made up out of whole cloth. The SEC relies upon no experience, and the record and briefs show not a single

instance of frustration of an offer caused by state laws. There has now been extensive experience under the various state laws, yet the SEC does not refer to this experience to support its contentions. The conclusion is clear; the experience under state laws does not support the SEC contentions.

The quote from Senator Williams at Footnote 58, Brief of SEC, advancing his belief that state laws interfere with federal law objectives and purposes is belied by experience under state law and the resulting premium to investors, increase in number of tender offers in recent years with the existence of state laws, and the fact that only about 15% of target companies survive a takeover bid. If the Senator refers to the concept of "balance" or "neutrality," then he mistakes a collateral effect with a congressional purpose, and neither Senator Williams or his staff, nor the SEC or its staff, nor former SEC members can answer the question of what "balance" Congress was looking for. What do "balance" or "neutrality" mean in light of the fact that target companies almost invariably succumb to a tender offer? The terms have never been defined. If they mean that both offeror and target management should be able to communicate fairly with the affected shareholders, the state takeover laws promote such communication.

At Footnote 59, Brief of SEC, the Commission correctly notes that its newly-proposed regulations would not delay commencement of a tender offer. But commencement time is an "opportunity time" during which potential competing tender offerors may assess the market and decide whether or not to make a competing bid. In no way does state law prefiling frustrate federal law objectives.

The SEC has not made a meaningful distinction between prefiling time and a limited (10 days as in the Williams Act) period for the offer to remain open as opposed to a more lengthy period for the offer to be open

(42 days in the newly proposed SEC rules). No informed shareholder tenders his securities until the end of the offering period. Thus, the early days of the offering period are precisely the same as a prefiling period.

Perhaps the most controversial portion of the new SEC Proposed Rules is proposed Rule 14e-2 which would require that as soon as a bidder has determined to make a tender offer it may not buy any shares of the class proposed to be tendered until it makes a public announcement of its intention to make the offer. This SEC proposal is conceptually similar to state law prefiling rules and indicates a tendency on behalf of the SEC toward a philosophy of pre-offer disclosure even though the SEC may itself feel precluded from direct pre-offer notification rules.

C. The Williams Act Merely Established Federal Minimums

The disclosures provided in the Williams Act are not the sole requirements of disclosure, but establish potential minimums which in some respects may be expanded upon by the SEC. [Section 13(d) (1); 15 U.S.C. § 78m(d) (1) 1970).] And there is nothing in the legislative history of the Williams Act or the Act itself to suggest that Congress intended to forbid states from expanding on the federal minimums. [See A. at 256-257 (Wheat).] The SEC's recent Proposed Rules and Schedule[17] (hereafter SEC Proposed Rules) further evidences the fact that the Williams Act establishes minimum requirements. At page 17 of the SEC Proposed Rules there is a general discussion of the proposals and the statement:

> Additionally, minimum information requirements were provided for the solicitation or recommendation communicated to security holders.

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[17] Securities and Exchange Commission Release Nos. 33-6022; 34-15548; IC-10575; File No. S7-770 dated Feb. 5, 1979 (17 C.F.R. Part 240).

The statement refers to a specific portion of the Williams Act. At page 95 of the SEC Proposed Rules there is a more expansive statement:

> In the Commission's view, the provisions of Section 14(d) (6) establish minimum protection requirements and, so long as these limited, minimum requirements are complied with, a bidder may provide in its tender offer for pro rata periods in excess of the statutory requirement.

At page 99 of the SEC Proposed Rules there is a reference to proposed Rule 14d-10(c) which "would establish minimal informational requirements for the solicitation or recommendation that is communicated to security holders."

Even with regard to the startling change in SEC policy in the proposed establishment of a 30 business day period in which a tender offer must remain open, the SEC has not closed the door on consideration of establishing a longer period before a tender offer may be consummated, for it requests at page 114 of the SEC Proposed Rules:

> While the Commission believes that the length of these minimum periods is appropriate for the protection of investors, specific comment is requested as to whether the time periods of these proposals ought to be longer or shorter and, if so, what periods should be adopted and the reasons therefor.

Thus, presumably, the Commission is at least indicating its tentative conclusion that a period of even longer than 30 business days (42 calendar days) during which a tender offer must remain open might be consistent with the Williams Act purposes.

It is perfectly obvious that if Senator Williams thought he was achieving a proper "balance" in 1968, Congress by its amendments since initial passage and the SEC now consider him to be gravely mistaken. The SEC has now

proposed what the state takeover statutes have done in the interim—providing additional time during which the offer must remain open. Thus, the SEC has finally achieved a measure of wisdom in this area which was achieved years earlier by most of the states. Obviously, the state laws have served a useful function, and provide a continuing valuable laboratory role that should only be closed down by direct congressional action.

The SEC Proposed Rules have room for improvement. They do not extend the 10 day period for proration. It is rather peculiar, in seeking to protect target company shareholders, that the Commission would expand the period during which an offer must remain open to 30 business days (up from the present 7 to 10 days), the period for withdrawal to 15 days (up from the present 7 days), yet do nothing about the rather short 10 day period for proration. Even the existing Williams Act time periods are not clearly spelled out. The offering period must be derived from the fact that if the shareholder has withdrawal rights for 7 days that, even in a tender offer for all shares, the offer must remain open for 7 days since it cannot be closed before the withdrawal right ends. And, if the tender offer is for less than all the target company shares, since the proration period extends for 10 days, then the bidder simply cannot as a practical matter end his offer before the 10 day period expires. Thus, what the SEC has at last attempted to do under its rule making power is to flesh out the abstruse time periods minimally set forth in the Williams Act and provide for an explicit period of time during which the offer must remain open, which time period differs from the periods for withdrawal rights and proration. The state law laboratories have helped to provide the experience from which the SEC may draw in considering its proposed rules.

D. The SEC May Not Have the Authority to Effect its Proposed Rules

The Commission is acting under section 14(e) [15 U.S.C. § 78n(e) (1970)] in promulgating the critical time period portions of its new Proposed Rules. The authorization provides:

> The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent such acts and practices as are fraudulent, deceptive, or manipulative.

The SEC has not justified its extension of the waiting period as necessary to prevent these practices. Its only justification is the favorable experience under state laws.

It is therefore likely that the Commission's Proposed Rules will be subjected to legal challenge which, if successful, would leave state laws as the only practical, effective means where benefits beyond the bare, minimal information and time periods provided by the Williams Act may continue to promote additional disclosures and provide for an auction market.

The last sentence of Footnote 59, Brief of SEC, makes it clear that the Commission's Proposed Rules make a deliberate attempt to create a situation where compliance with both state and federal law is impossible—an attempt to create an operational preemption by agency rule though Congress was unwilling to accomplish the same by legislation. While this action is, again, questionable in light of the fact that the Commission's powers of rulemaking in this area extend only to prevention of acts and practices which are fraudulent, deceptive, or manipulative (attributes hardly ascribable to state regulation of tender offers), even if the Proposed Rules were legal in all respects all that would be required of the states would be conformity of

their laws to federal rule so as to eliminate the newly-created narrow conflict.

Finally, at page 57, Brief of SEC, the Commission claims that the "delay" engendered by state takeover laws may have a "chilling effect" on bidders which is antithetical to Congress' evenhanded regulatory scheme. Yet, the SEC's own Proposed Rule of a 30 business day (42 calendar day) "delay" period itself is a clear demonstration that a comparable extended period of time for consideration is highly desirable and beneficial to target shareholders.

CONCLUSION

For the reasons discussed above and further set forth in the Brief for the Appellants and Appellants' Reply Brief, the judgments by the courts below should be reversed.

Respectfully submitted,

PETER E. HEISER, JR.
SPECIAL DEPUTY ATTORNEY GENERAL OF IDAHO
Counsel for Appellants

April 25, 1979.

Addendum

GREEN BAY & WESTERN RAILROAD
8/15/77 .... A & K Railroad Material, Inc. $120
11/22/77 ... Bras Corporation $150
12/8/77 .... Itel Corporation $330

PET
6/8/78 ..... IC $54
7/17/78 .... IC $55

P.R. MALLORY
11/13/78 ... Dart $46
11/21/78 ... Dart $51

AIRCO
1/3/78 ..... BOC Financial Corporation $43
4/3/78 ..... Martin Marietta Corporation .....$50 (withdrew)
4/14/78 .... BOC Financial Corporation $50

UARCO
10/25/78 ... Dart $42
12/1/78 .... Daylin .....$48 (withdrew)
12/12/78 ... City Investing $52

SERVOMATION
8/7/78 ..... GDV (City Investing) $42
8/25/78 .... Liggett Food Services $46
8/25/78 .... GDV (City Investing) $47
8/28/78 .... Liggett Food Services $48.50
9/1/78 ..... GDV (City Investing) $49

THE SEVEN-UP COMPANY
5/1/78 ..... Phillip Morris Inc. $41
5/11/78 .... Phillip Morris Inc. $46
5/16/78 .... Phillip Morris Inc. $48

CONTRAN
2/20/78 .... Danco, Inc. $35
7/11/78 .... Danco, Inc. $50

COLONIAL STORES
7/10/78 .... Grand Union $30
8/8/78 ..... Grand Union $35

COLLEGE UNIVERSITY CORPORATION
7/25/78 .... California Life $29
9/27/78 .... Monarch Life .....$35 (withdrew)
10/16/78 ... Baldwin United $38.50
10/23/78 ... California Life .....$40 (withdrew)

THE DIVERSEY CORPORATION
4/21/78 .... The Molson Companies Ltd. $28
5/19/78 .... The Molson Companies Ltd. $30

DYMO INDUSTRIES
5/15/78 .... Oxford Pendaflex $24
5/25/78 .... Daylin .....$30 (withdrew)
5/25/78 .... Oxford Pendaflex $30

ALLIED THERMAL CORPORATION
9/13/77 .... Interpace $22
11/2/77 .... Jim Walker Corp. $26
11/11/77 ... Interpace $30

IMPERIAL AMERICAN ENERGY
9/27/77 .... Consolidated Oil & Gas, Inc. $17
10/12/77 ... Mesa Petroleum Co. .....$20.73 (withdrew)
10/17/77 ... Petro-Lewis $20

THE HILLHAVEN CORPORATION
4/4/78 ..... Manor Care, Inc. $13.50
5/8/78 ..... The Hillhaven Corp. $15.50
5/9/78 ..... Manor Care, Inc. $15
5/16/78 .... The Hillhaven Corp. $16.25
5/23/78 .... Manor Care, Inc. $17
5/23/78 .... The Hillhaven Corp. $18
5/24/78 .... Manor Care, Inc. $17.50

AMERICAN MEDICORP
10/7/77 .... Humana Inc. $16.83
12/21/77 ... Hilton International $20
12/30/77 ... Humana Inc. $28.75

AMERICAN FINANCE SYSTEMS, INC.
2/13/78 .... Aristar, Inc. .....$ 9.50
4/4/78 ..... Aristar, Inc. .....$11 (withdrew)
5/24/78 .... Security Pacific Corp. $10

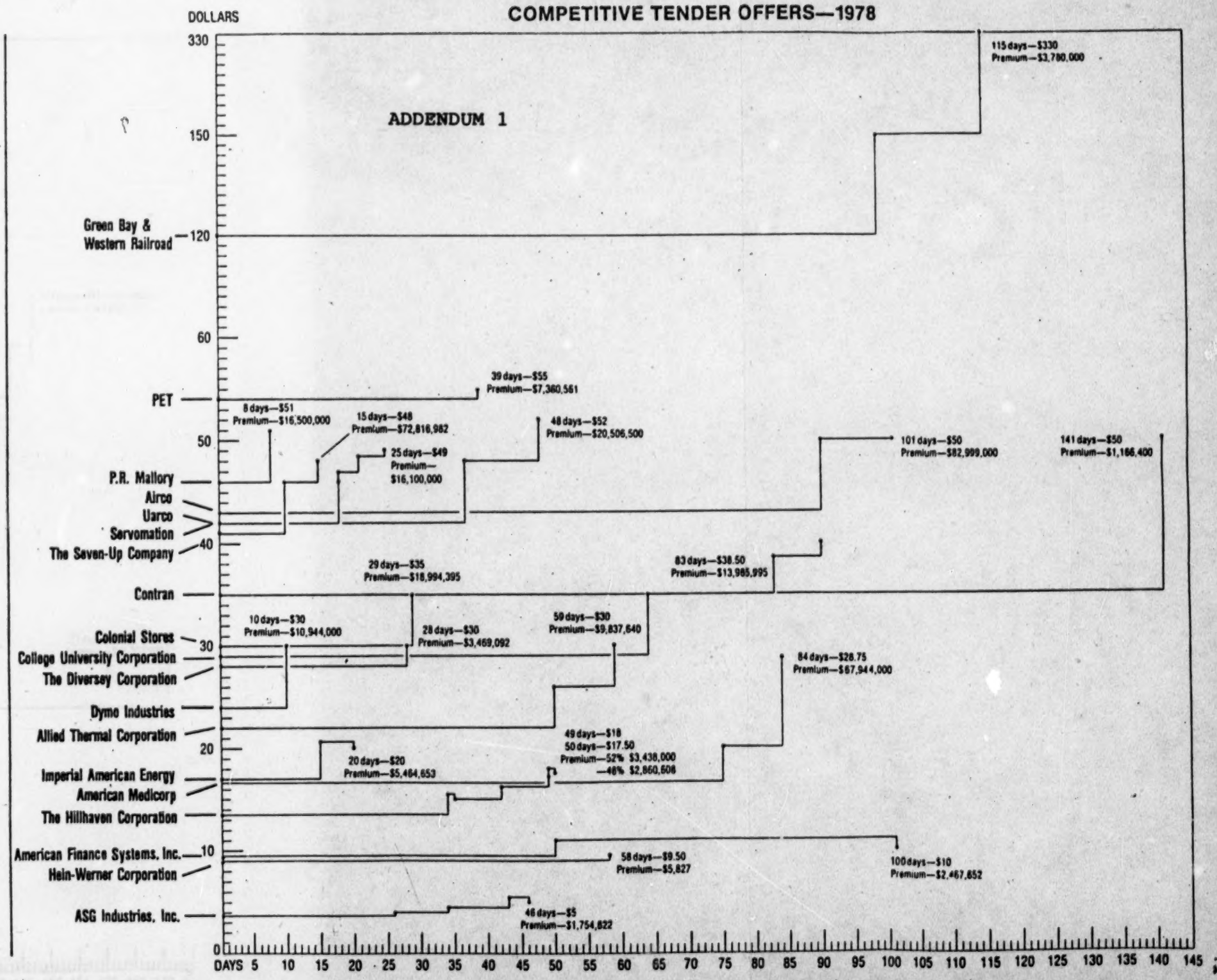
HEIN-WERNER CORPORATION
6/26/78 .... American Investment Corporation ....$ 9
8/25/78 .... American Investment Corporation ....$ 9.50

ASG INDUSTRIES, INC.
4/27/78 .... Associated Imports Inc. .....$ 3.75
5/23/78 .... Fource Glass Co. .....$ 4.00
5/31/78 .... Associated Imports, Inc. .....$ 4.50
6/9/78 ..... Associated Imports, Inc. .....$ 5.50 (withdrew)
6/12/78 .... Fource Glass Co. .....$ 5.00

WILLIAM E. CHATLOS
GEORGESON & CO.

COMPETITIVE TENDER OFFERS—1978

ADDENDUM 1



COMPETITIVE TENDER OFFERS—1977

BURGESS VIBOCRAFTERS
- 2/4/77 ..... Intermatic, Inc. $22
- 2/7/77 ..... Intermatic, Inc. $24
- 3/3/77 ..... Acme General Corp. $27

AVIS
- 5/18/77 .... Fuqua Industries Inc. $15.50
- 6/29/77 .... Norton Simon Inc. $22

CHEMETRON
- 8/25/77 .... Crane Co. $40
- 9/1/77 ..... Crane Co. $48
- 9/9/77 ..... Alleghany Ludlum $55

COCA-COLA BOTTLING COMPANY
- 10/11/77 ... MCA Enterprises, Inc. .....$30 (common) $58.50 (preferred)
- 10/19/77 ... Northwest Industries .....$40 (common) $78 (preferred)

THE CARBORUNDUM COMPANY
- 11/10/77 ... Eaton Corp. $47
- 11/29/77 ... Kennecott Copper Corp. $66

AMTEL
- 11/14/77 ... Dominion Bridge Co. $15
- 11/23/77 ... Dominion Bridge Co. $16.50

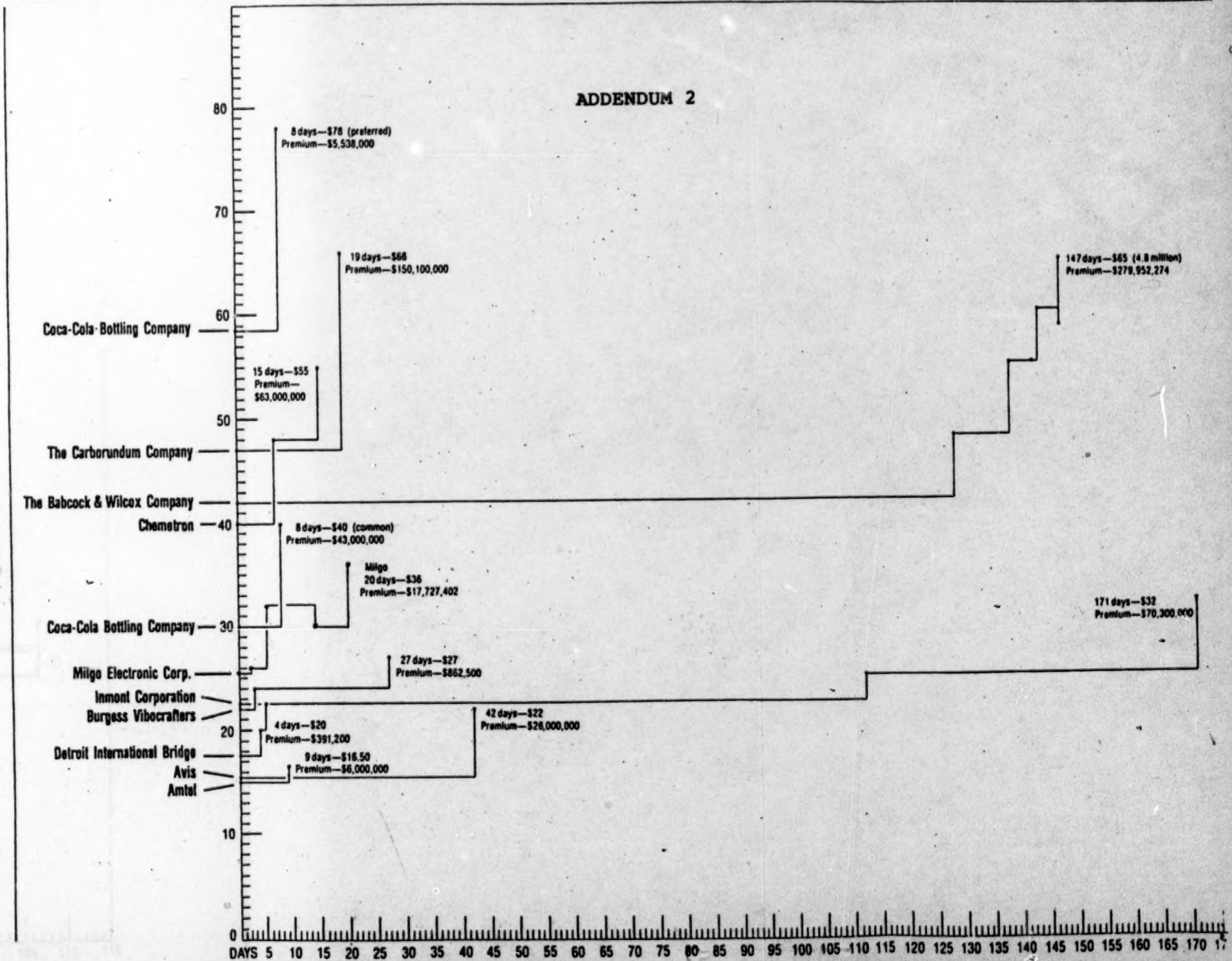
INMONT CORPORATION
- 2/22/77 .... Esmark, Inc. $22.50
- 6/14/77 .... Esmark, Inc. $25
- 8/12/77 .... Carrier $32

THE BABCOCK & WILCOX COMPANY
- 3/29/77 .... United Technologies Corp. .....$42 (all shares)
- 8/4/77 ..... United Technologies Corp. .....$48 (all shares)
- 8/14/77 .... J. Ray McDermott & Co., Inc. .....$55 (4.3 million)
- 8/18/77 .... United Technologies Corp. .....$55 (all shares)
- 8/19/77 .... J. Ray McDermott & Co., Inc. .....$60 (4.3 million)
- 8/23/77 .... United Technologies Corp. .....$58.50 (all shares)
- 8/23/77 .... J. Ray McDermott & Co., Inc. .....$65 (4.8 million)

DETROIT INTERNATIONAL BRIDGE
- 10/13/77 ... Ledeer Group $17.60
- 10/17/77 ... Wesco Financial Corp. $20
- 10/18/77 ... Ipex Group Inc. $22.50
- (5/22/77 ... Ipex Group Inc. .....$37 (withdrew)

MILGO ELECTRONIC CORP.
- 1/19/77 .... Applied Digital $25.50
- 1/21/77 .... Racal Electronics $28
- 1/24/77 .... Applied Digital $32
- 2/2/77 ..... Racal Electronics $30
- 2/8/77 ..... Racal Electronics $36

Premium—$17,727,402



WILLIAM E. CHATLOS
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